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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OTIS TRAMMEL, JR.,
APPELLANT,
vs.
UNITED STATES OF AMERICA,
APPELLEE.

NO. 78-5705

PETITION FOR WRIT OF CERTIORARI

COMES NOW the above-named Appellant by and through his Court Appointed Attorney, Frederick A. Fielder, Jr., for his Petition for Writ of Certiorari states to the Court as follows:

1. (Reports of the case in the Court below)

Appellant herein was convicted in a jury trial of Importation of Heroin in violation of Title 21 U.S.C. §952(a) and Conspiracy to Import Heroin in violation of 21 U.S.C. §962(a) and 963 in the United States District Court for the District of Colorado, and judgment was entered on July 16, 1976.

2. (Grounds on which the jurisdiction of this Court is invoked)

The date of the judgment sought to be reviewed was filed in the United States Court of Appeals for the Tenth Circuit on October 11, 1978. The jurisdiction of this Court is invoked under Title 28 U.S.C.§1254(1) and Rule 19 of the Rules of the Supreme Court of the United States.

3. (The question presented for review)

Is it reversible error to permit a wife to testify against her husband over his objection and without his consent?

This issue includes consideration of the common law privilege, Rule 501 of the Federal Rules of Evidence, and what effect, if any, grant of immunity to the witness has upon the privilege and the Rules of Evidence.

4. (Citations of law involved in this case)

21 U.S.C. §952(a)

"It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V of title II, except that--

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States--

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 303 /21 USCS §823/,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium."

21 U.S.C. §963

"Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

18 U.S.C. §6002

"Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House or Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

5. (Statement of the case)

Elizabeth Trammel testified as a witness, under a grant of immunity, at the Trial of the Appellant. Among other things she testified to the fact that she was married to the Appellant on May 31, 1975, and further testified that she and the Appellant were still married at the time that the Trial was in progress. The evidence produced was that Mrs. Trammel was arrested in Hawaii attempting to import heroin into the United States from the Philippines. At the time of her arrest she agreed to cooperate with law enforcement agents of the United States, and deliver the heroin to persons she claimed to be meeting within the United States so that those persons might be apprehended.

At the Trial Mrs. Trammel testified that she and the Appellant had previously imported heroin from the Philippines to the United States, and that her husband, the Appellant, together with the other Co-Defendants and alleged

Co-Conspirators had then sold the heroin within the United States. Mrs. Trammel also testified that at the time of her arrest in Hawaii, she was importing heroin into the United States at the direction of her husband and the Co-Defendants in this case. Prior to the Trial of the case, a motion was filed to sever the Defendants or in the alternative to prevent Mrs. Trammel from testifying against the Appellant. That motion was denied. During the Trial the Appellant objected to any and all testimony from Mrs. Trammel that related in any way to him claiming the husband/wife privilege, and that objection was overruled. Except for the testimony of Mrs. Trammel, there was no other testimony implicating the Appellant in the importation of heroin or any conspiracy to import heroin.

6. (Basis of original Federal jurisdiction)

Appellant was charged in the District of Colorado with the importation of heroin in violation of Title 21 U.S.C. §952(a) and with conspiracy to import heroin in violation of Title 21 U.S.C. §962(a) and 963.

7. (Argument for allowance of the Writ)

The United States Court of Appeals for the Tenth Circuit has decided this issue in conflict with applicable decisions of this Court, and has departed from the accepted and usual course of judicial proceedings where the husband/wife privilege is involved. Moreover, this appears to be a case of first impression where Rule 501 of the Federal Rules of Evidence is concerned. We contend that there are basically two privileges which are historically recognized by the Federal Courts arising out of the marital relationship. The first privilege bars testimony of one spouse as to confidential communications with the other; and the second

privilege bars one spouse from testifying against the other without the consent of the spouse against whom the testimony is offered. It is the second of these privileges that is the main subject of this argument. In Hawkins v. United States, 358 U.S. 74 (1958), held that the testimonial privilege is the law in the Federal Courts, and in so doing overturned a decision of the United States Court of Appeals for the Tenth Circuit. Rule 501 of the Federal Rules of Evidence give the Courts the right to interpret common law privileges in the "light of reason and experience." This particular privilege has been interpreted by this Court to apply to all Federal Courts because of the public policy need to foster family peace and the maintenance of the family unit.

The majority opinion in this case attempts to carve out some exception to the husband/wife privilege based upon the immunity statutes, Title 18 U.S.C. §6001 through 6005. We contend that the statutes regarding witness immunity have nothing whatever to do with this privilege, and is merely a method of obtaining testimony that would otherwise be unavailable because of the Fifth Amendment to the Constitution of the United States of America. To permit a grant of immunity to be used as a substitute for this privilege leads to the logical conclusion that all privileges may be extinguished in any transaction where the Attorney General of the United States deems it necessary to petition a Court for witness immunity.

Based on the above circumstances, this Court is urged to grant a Writ of Certiorari so that it my review the conviction of the Appellant below.

Respectfully submitted,

FREDERICK A. FIELDER, JR. #2197
200 Steele Park
50 South Steele Street
Denver, Colorado 80209
388-6221

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APPELLEE.

NO. _____

AFFIDAVIT

I, Frederick A. Fielder, Jr., of lawful age, being first duly sworn depose and state:

That I am the Court Appointed Attorney for the Appellant in the above-captioned case;

That all statements made in the attached Motion to Proceed in Forma Pauperis are true and correct to the best of my knowledge and belief;

And that this is an appropriate case for forma pauperis proceedings under Rule 53 of this Court.

IN WITNESS WHEREOF, I have hereunto set my hand this 10 day of November, 1978.

Frederick A. Fielder, Jr.

SUBSCRIBED AND SWORN to before me this 10 day of November, 1978.

Notary Public

(SEAL)

My Commission Expires:
May 13, 1980

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IN THE SUPREME COURT OF THE UNITED STATES

OTIS TRAMMEL, JR.,
APPELLANT,
vs.
UNITED STATES OF AMERICA,
APPELLEE.

NO. _____

MOTION TO PROCEED IN FORMA PAUPERIS

COMES NOW the above-named Appellant, by and through his Court Appointed Attorney, Frederick A. Fielder, Jr., and states to the Court as follows:

1. The Appellant was tried and convicted for violations of Title 21 U.S.C. §952(a), 962(a) and 963 by a jury trial in the United States District Court for the District of Colorado, and has been ordered to surrender to begin serving his sentence on Monday, November 13, 1978.

2. The Appellant, being an indigent, had the undersigned designated as his Court Appointed Attorney for the purpose of taking an appeal to the United States Court of Appeals for the Tenth Circuit, and on October 11, 1978, after submitting briefs and the presentation of oral argument, the conviction of the Appellant was affirmed. To the best of the knowledge and belief of the undersigned, it is the desire of the Appellant herein to seek review of his conviction by the Supreme Court of the United States as provided in 28 U.S.C. §1254(1).

WHEREFORE, Appellant moves this Court to allow him to proceed in forma pauperis as provided in Rule 53 of this Honorable Court.

Respectfully submitted,

FREDERICK A. FIELDER, JR., #2197
200 Steele Park
50 South Steele Street
Denver, Colorado 80209
388-6221

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1834

FILED
United States Court of Appeals
Tenth Circuit
OCT 11 1978
HOWARD K. PHILLIPS
Clerk

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. OTIS TRAMMEL, JR., Defendant-Appellant.	)	Appeal from the United States District Court for the District of Colorado (D.C. No. 76-CR-57)

Joseph F. Dolan, United States Attorney (James L. Treece, former United States Attorney, and Rod W. Snow, Assistant U.S. Attorney on the brief), for Appellee.

Frederick A. Fielder, Jr., Fielder and Wiggins, P.C., for Appellant.

Before McWILLIAMS, BARRETT and McKAY, Circuit Judges.

BARRETT, Circuit Judge.

Otis Trammel, Jr. appeals his conviction, following a trial by jury, of the offenses of importation of heroin, 21 U.S.C.A. §952(a), and conspiracy to import heroin, 21 U.S.C.A. §§962(a), 963 (1970). Trammel was tried jointly with two co-defendants, Edwin Lee Roberts and Joseph Freeman. The three had been charged, by indictment, with importation and conspiracy to import heroin.

The three were charged with conspiracy to transport heroin from the Philippines to the United States and with the actual importation of heroin. None of the three defendants testified at trial. The government's case was substantially anchored to the testimony of two unindicted co-conspirators, Janice Keenan, a friend of Edwin Lee Roberts, and Elizabeth Trammel, wife of appellant Otis Trammel, Jr. Janice Keenan and Elizabeth Trammel had been granted immunity from prosecution in return for their testimony.

Prior to trial, appellant moved to sever his trial from that of Roberts and Freeman, or, in the alternative, to prevent his wife, Elizabeth Trammel, from testifying against him.

On appeal, Trammel contends that the trial court committed reversible error by allowing his wife to testify against him over his objection and without his consent. He asserted, of course, the husband/wife privilege which prevents one spouse from giving testimony adverse to the other without his or her consent. We hold that the trial court did not err in admitting the testimony of Elizabeth Trammel.

The court did exclude evidence of confidential communications between the Trammels. However, the court denied Otis Trammel's assertion of the husband/wife testimonial privilege.

Trammel argues that the trial court erred in admitting the testimony of his wife, Elizabeth, against him because they were validly married at all times charged, the charges do not involve an assault by him against her and the charges do not involve an assault by him against children of their marriage. The Government argues that Elizabeth Trammel's testimony was properly admitted inasmuch as it was limited to acts as distinguished from communications and to statements of Otis Trammel made in the presence of third parties. Thus, the government reasons that the privilege does not arise. Further, the government contends that even if the communications could be considered confidential and privileged, still they would not be protected from disclosure where both spouses participated in the unlawful enterprise.

Trammel relies primarily on Hawkins v. United States, 358 U.S. 74 (1958). That opinion does re-affirm the long-standing common law rule which prohibits one spouse from either voluntarily or under compulsion testifying against the other spouse in a criminal prosecution wherein the other spouse is a defendant, unless the other spouse consents thereto. The Supreme Court stated that "The rule rested mainly on a desire to foster peace in the family and on a general unwillingness to use testimony of witnesses tempted by strong self-interest to testify falsely." 358 U.S. at p. 75. Nothing in Hawkins or any other reported decision, to our knowledge, prohibits the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the Government in return for her testimony.

The crux of the common-law rule in the case of a defendant husband, as here, is that the exclusion of the wife's testimony is required in order to prevent ill feeling against her on the

husband's part for her revelation of the truth. Thus, the privilege is that of the defendant spouse preventing the other spouse from testifying against him without his consent. Hawkins v. United States, supra; United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975); United States v. Harper, 450 F.2d 1032 (5th Cir. 1971); United States v. Moorman, 358 F.2d 31 (7th Cir. 1966), cert. denied, 385 U.S. 866; Peek v. United States, 321 F.2d 934 (9th Cir. 1963), cert. denied, 376 U.S. 954 (1964).

Hawkins, supra, and other decisions involving the same issue, have stressed that the courts have the right and the responsibility to examine the policies behind the federal common law privileges and to alter, modify or amend them when reason and experience so demand.

In our view, a compelling need to alter or amend the common-law rule enunciated in Hawkins is dictated by "reason and experience" in the instant case. The witness, Elizabeth Trammel, was a co-conspirator, a participant in the heroin importation scheme and transaction. As such, she was subject to prosecution. The federal immunity statutes, 18 U.S.C. §§6001-6005, represent an accommodation between the right of the Government to compel testimony on the one hand, and the constitutional privilege to remain silent, on the other. United States v. Tramunti, 500 F.2d 1334 (2nd Cir. 1974), cert. denied, 419 U.S. 1079 (1974). The purpose of the grant of immunity is to reach the truth, and when that testimony is incriminatory, it cannot be used against the witness. The Congressional intent, then, is that the statutory claim of immunity be as broad as, but no broader than, the privilege against self-incrimination. Childs v. McCord, 420 F. Supp. 428 (D.C. Md. 1976), affirmed, 556 F.2d 1178 (4th Cir. 1977).

A defendant has no standing to contest the propriety of the grant of immunity to a witness. United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975). Otis Trammel, as a defendant, thus was without standing to challenge the grant of immunity to his wife, Elizabeth, unless the privilege asserted by reason of the marital relationship is such that the rule of "reason and experience" mandates that the privilege asserted overrides the grant. We hold that it does not.

In our view the allegiance reaffirmed in Hawkins, supra, to the marital testimonial privilege grounded on the policy of preserving or fostering family peace must give ground to a greater, more compelling public need before us here. This case, unlike Hawkins and other like cases, involves the wife as a participant in the criminal transaction, subject to prosecution therefor. It matters not, in this context, that the witness granted immunity is the spouse of one of the defendants. The common law did not fail to recognize that the rule of privilege between husband and wife was subject to some exceptions, generally premised on the ground of necessity. The necessity was that of avoiding an extreme injustice to the excluded spouse which would ensue upon an undeviating enforcement of the rule. Accordingly, an exception which has been widely recognized in order to protect both the husband and wife arises in cases involving a crime perpetrated by one spouse against the other, termed a "personal wrong." The predicate, of course, is that it is illogical to believe that marital peace can be achieved or promoted by denying a wife who has been beaten, deserted or otherwise badly maltreated the right to testify against her husband about those wrongs. 8 Wigmore on Evidence, McNaughton Revision, Vol. VIII, §2239.

The various judicial utterances on the matter of the exercise of the privilege establish that the privilege belongs to the party spouse against whom the other is offered as a witness; however, it is firmly established that the privilege also belongs to the witness spouse. See, generally, 81 Am. Jur. 2d, Witnesses, Husband and Wife, §§148-171; Wigmore on Evidence, McNaughton Ed., Vol. VIII, Ch. 79, §§2227-2245; United States v. Cameron, 556 F.2d 752 (5th Cir. 1977).

None of the decisions applying the unvarying prohibition rule, i.e., that one spouse may not give testimony against the other without his or her consent, involve the fact situation presented here: Where both the husband and wife have jointly participated in a criminal conspiracy, both are subject to prosecution, and one spouse testifies against the interest of the other under grant of immunity. However, in United States v. Smith, 520 F.2d 1245 (8th Cir. 1975), the court held that in a prosecution of a husband and wife jointly charged with conspiracy, statements made by either inculpatory to the other during the course of and in furtherance of the conspiracy were admissible. See, also, 16 Am. Jur. 2d, Conspiracy, §41.

A claim of the Fifth Amendment privilege is a prerequisite to the grant of immunity. Thus, the constitutional privilege cannot be violated before it can be invoked. In the case at bar, then, Elizabeth Trammel did invoke her Fifth Amendment privilege against self-incrimination. Having done so, she brought herself -- as a party to the criminal transaction -- within the rule that she who would have the benefit of the privilege must claim it.

This court has held that a defendant husband, in a criminal proceeding, cannot avail himself of the asserted marital privilege

preventing the Government from presenting inculpatory testimony of his spouse where the marriage was found to have been entered into fraudulently. United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975). We hold that, to like effect, a defendant husband who has jointly participated in a criminal conspiracy with his wife cannot prevail upon his claim of the marital privilege when his wife gives incriminating testimony under grant of immunity.

We have read and considered United States v. Williams, 447 F.2d 894 (5th Cir. 1971); Ivey v. United States, 344 F.2d 770 (5th Cir. 1965) and Peek v. United States, supra. These opinions stand for the bald rule that the testimony of a spouse who is a co-conspirator in the same transactional criminal charges brought against the other spouse cannot testify against the charged spouse in derogation of the husband-wife privilege. These decisions, significantly, do not involve the testimony of a spouse given under grant of immunity. Thus, the "balancing test" function was not brought into play in the above cited opinions.

The applicable rule and reason, in our view, is that applied in United States v. P. Van Drunen, 501 F.2d 1393 (7th Cir. 1974), cert. denied, 419 U.S. 1091 (1974). There the defendant's wife was permitted to testify against him relative to matters involving the illegal transportation of an alien which both spouses participated in. There was no grant of immunity involved in the case. The court recognized that Hawkins, supra, was arguably a barrier to the result reached but concluded:

> . . . here, we think that goal (that of preserving the family) does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an

accomplice or coconspirator he is creating another potential witness.

* * *

We do not view Hawkins as controlling . . . . The Supreme Court has since announced an exception to Hawkins for cases where one spouse commits a crime against another (Wyatt v. United States, 362 U.S. 525, 80 S.Ct. 901, 4 L.Ed.2d 931) and we decline to read the Hawkins opinion as foreclosing the possibility of other exceptions not discussed therein.

501 F.2d, at pp. 1396, 1397.

Fed. Rules Evid. Rule 501, 28 U.S.C.A. does not recognize a per se marital privilege rule. It does state the general rule of privilege to be ". . . governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Thus, several courts, including this court, have followed the rule we here apply involving similar husband-wife conspiracy transactions. Baker v. United States, 329 F.2d 786 (10th Cir. 1964), cert. denied, 379 U.S. 853 (1964); United States v. Pugliese, 153 F.2d 497 (2nd Cir. 1945).

Immunity statutes have been characterized as essential to the effective enforcement of criminal statutes. Kastigar v. United States, 406 U.S. 441 (1972). Inasmuch as the constitutional guarantees against self-incrimination apply solely for the benefit of a witness in danger of actual conviction (such as Elizabeth Trammel in the instant case), otherwise privileged testimony involving self-incriminating matters may be required.

Exceptions to the common-law rules excluding privileged testimony by one spouse against the other in a criminal prosecution must be made in order to effect the beneficent purposes of the rule. In keeping with the mandates of Rule 501, supra, federal courts must determine on a case-to-case basis whether "reason and experience" dictates the alteration or amendment of the marital privilege. In the present case, we believe that there are certain factors which, for all practical purposes, indicate that the testimony of Elizabeth Trammel was not the "death knell" to the existence of the marriage. The parties were extensively engaged in criminal activities shortly following their marriage on May 31, 1975. The record fairly evidences that commencing in August of 1975, Otis Trammel, Jr., (Elizabeth's husband), Edwin Lee Roberts and Joseph Freeman conspired and "masterminded" the scheme to accomplish importation of heroin into the United States from Thailand. Elizabeth Trammel may or may not have freely consented to her participation in the scheme. The record fairly reflects, we believe, that both Elizabeth Trammel and Janice Keenan were "conduits" or "actors" to accomplish the illicit goals of the scheme. They were being "used." Whether they participated voluntarily or otherwise at all times is a matter for rank conjecture. The record is clear, however, that when their participation in the conspiratorial enterprise was discovered by federal DEA agents who then confronted them, each agreed to cooperate with the federal agents, and they did so. The record evidences that each woman followed instructions from the three charged co-conspirators. Neither planned nor "masterminded" the importation scheme. The same is not true of appellant Otis Trammel, Jr.

It is inconceivable that the Trammels established a "home" with any of the usual, ordinary attributes of "family life." There was no domestic harmony in the commonly accepted nature of a marital relationship to be preserved following commencement of the criminal activities in August of 1975. Beyond this, the nature of the criminal activities pursued are despicable and completely alien to anything conducive to the preservation of a family relationship built around the legal status of marriage. The conduct of the parties shortly following their marriage to the time of appellant Trammel's arrest lent absolutely nothing in building upon, preserving or fostering "family peace" not only "for the benefit of husband, wife and children, but for the benefit of the public as well." Hawkins v. United States, supra, at pp. 77, 79.

The facts and circumstances reflected by this record mandate the exception referred to in Hawkins, supra, and Rule 501, supra. The illicit heroin importation activities pursued by the parties would have effectively denied the establishment of "family peace" which could in anywise have been alienated by Elizabeth Trammel's testimony. Thus, reason and experience dictate that the marital privilege rule could not be invoked by appellant Trammel. The law does not force or encourage testimony which would likely alienate husband and wife, or inflame "existing domestic differences." The overriding benefit to be served in this case has been properly served by the action of the trial court: that of bringing to the bar of justice those who have committed grievous criminal acts which most assuredly have led to the breakdown and destruction of many family units and marital relations involving illicit trafficking and use of dangerous drugs and narcotics.

WE AFFIRM.

McKAY, dissenting:

Mr. and Mrs. Trammel have not only wasted their young lives and exploited the weaknesses of drug addicts for profit, but by their sordid activities they have led us in today's decision to establish a rule for future cases which is unsound and contrary to established precedent. In so doing they have caused us to ignore some time honored presumptions, to forego an opportunity to continue a modest contribution to the withering but vital institution of the family, and to further expand the already excessive role of the doctrine of conspiracy in undermining fundamental rules of law.

If today's opinion affected only Otis Trammel and his wife, I would view it with some concern but not with the degree of apprehension expressed in this dissent. The significance of today's decision is that it establishes a policy for every future case in which a prosecutor exercising his essentially unreviewable discretion decides to accuse a married couple as coconspirators. While the testimony in this case does not portray the defendant as a person deserving of great sympathy, tomorrow's case may involve a financially troubled couple who appear to be model spouses but are accused of conspiracy to file a false tax return. When, under the rule of this case, the wife is offered a chance to avoid a possible conviction by testifying against her accused husband, the harm the testimonial privilege seeks to prevent will have been done.

An analysis of the issues presented by this case requires a recognition that there are two distinct privileges based on the marital relationship. The spousal testimony privilege prevents one spouse from giving testimony adverse to the other, either voluntarily or under compulsion, without the other's consent. Hawkins v. United States, 358 U.S. 74, 77 (1958). The confidential marital communication privilege bars introduction of any confidential communications between spouses. United States v. Apodaca, 522 F.2d 568, 570 (10th Cir. 1975). Only the first privilege is at issue in this case.

In overturning a decision of this circuit, the Supreme Court affirmed in Hawkins v. United States, 358 U.S. 74 (1958), that the testimonial privilege is the law in the federal courts. The decision sets forth the parameters of the rule. In Hawkins a man was accused of transporting a girl from Arkansas to Oklahoma to work with his wife as a prostitute. As in the case before us, the wife was an alleged participant in criminal activity. Unlike the record in this case, however, the evidence showed that the marriage was already in trouble and the parties were living apart. The court treated the wife's testimony as voluntary, but it reaffirmed the testimonial privilege. Reasoning that the rule is grounded on the sound policy of fostering "family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well," the Court declared that even if the marriage was not an ideal one "the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences." Id. at 77, 79 (emphasis supplied).

This rule has been acknowledged by federal courts in cases where the spouses were alleged coparticipants in crimes. See, e.g., United States v. Williams, 447 F.2d 894, 897-98 (5th Cir. 1971); Ivey v. United States, 344 F.2d 770, 772-73 (5th Cir. 1965); Peek v. United States, 321 F.2d 934, 943 (9th Cir. 1963), cert. denied, 376 U.S. 954 (1964).[1/] The Tenth Circuit decision relied on by the majority, Baker v. United States, 329 F.2d 786 (10th Cir.), cert. denied, 379 U.S. 853 (1964), was a case in which the testimonial privilege was not even asserted by the defendant. Indeed, the majority acknowledges the general rule but urges an exception. I respond to the reasons given for this departure from established policy and precedent in the order presented by the majority.

It is urged that Hawkins grants a license for this court to "alter, modify or amend [the testimonial privilege] when reason and experience so demand." I am not certain that Hawkins provides such an expansive grant. Although I recognize that other circuits have acted to modify the privilege, e.g., United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974), I also recognize that the Supreme Court has suggested that changes in the privilege are best left to Congress or to the

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1/ One case seems clearly contrary, but it involved testimony of events occurring prior to marriage and reflected the impact of Rule 505(c) of the proposed Federal Rules of Evidence, which excepted such testimony from the scope of the privilege. United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). Two additional cases contain language suggesting a narrowing of the privilege, but they did not involve calling the other spouse as a witness. United States v. Mackiewicz, 401 F.2d 219 (2d Cir.), cert. denied, 393 U.S. 923 (1968); United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945).

Court itself.[2/] Hawkins v. United States, 358 U.S. at 78. At the very least, we should be cautious about eroding the privilege on the impetus of a solitary case. In this regard, we should be guided by the counsel of Mr. Justice Stewart, the lone doubter in Hawkins, who observed in concurrence that "[i]t is obvious, however, that all the data necessary for an intelligent formulation 'in the light of reason and experience' could never be provided in a single litigated case." Id. at 82 n.4. As an alternative to such a precipitate resolution of the issue, he proposed that a judicial committee be established to gather appropriate information and incorporate it into adequately considered rules. Whatever course proves ultimately wise, I do not think this case presents an adequate factual setting in which to make today's sweeping choice.

The majority insists that the federal immunity statutes, 18 U.S.C. §§ 6001-6005 (1976), provide justification for the proposed exception. These are irrelevant. They address only the Fifth Amendment rights of the declarant. The majority itself acknowledges that Congress intended by the rule a grant no broader than the Fifth Amendment itself. But the testimonial privilege extends beyond the declarant to the accused spouse, and the immunity statutes say nothing about his privilege. The immunity provisions are based on the notion that there is no injustice in compelling a witness to testify in the face of Fifth Amendment proscriptions

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2/ 18 U.S.C. § 3771 (1976) vests in the Supreme Court the power to prescribe rules of pleading, practice, and procedure for criminal cases in federal courts.

as long as he will not be subject to prosecution for his testimony. This quid pro quo rationale has no application to the situation under consideration here, for no such bargain is struck with respect to the accused spouse. The immunity statutes simply provide no sound justification for fashioning a new exception to the privilege. The majority nonetheless believes that the perceived injustice of excluding immunity-enshrouded testimony is sufficient to justify an erosion of the testimonial privilege. To me this view is inconsistent with the mandate of Hawkins and its reluctance to abandon the "persistent instincts of several centuries" that have culminated in the privilege. 358 U.S. at 79.

The majority seems to imply that something inherent in the doctrine of conspiracy itself justifies overturning the privilege. Even assuming the doubtful proposition that conspiracy has such a sweeping scope, applying the doctrine to overcome the testimonial privilege ignores significant procedural ramifications. Under present practice in this circuit, the mere allegation of conspiracy would permit the admission of the wife's testimony before the truth of the conspiracy allegation is established. In this procedural framework, the destruction of the privilege would not only effectively overturn the presumption of innocence with respect to the conspiracy charge, but it would accomplish the harm forbidden by Hawkins before either judge or jury has determined that there was any conspiracy at all.

I confess inability to comprehend what it is in the record of this case that supports the propositions that the Trammels did not have a "home," that they had no "family life" or that there

was no "domestic harmony in the commonly accepted nature of a marital relationship." The trial court did not address these questions. Presumably the propositions reflect a view that spouses who commit crimes are incapable of achieving a harmonious marriage. I am not convinced that this view is a sound one, and I discern no support for it in the majority opinion. Even if there were evidence of domestic disharmony virulent enough to destroy family life, this would offer no justification for distinguishing the Hawkins precedent. The Supreme Court reached its decision in that case in the face of actual evidence of severe marital discord. 358 U.S. at 82 n.4. It should also be remembered that the Supreme Court was not only loath to alienate husband and wife in a model marriage, but was concerned about inflaming existing differences in a stressful one as well.

I should also say a word about the conflict between the government's interest in obtaining evidentiary support for its accusations and society's interest in perpetuating a privilege intended to promote family unity. All of the arguments about evidentiary needs are equally applicable to the protections of the accused incorporated in the Bill of Rights. While not found in the Bill of Rights, the common law privilege at issue here reflects societal values similar to those expressed in that document. Today's rule articulates an unsound policy to the extent that it gives the prosecutor discretion to determine which home shall be worth saving and which home shall not have the benefit of the common law privilege. While the majority may be upholding important societal values in reaching the result it does, it

seems to me that the principle established in this case strikes at one of the few remaining public supports for the institution of the home. And the home is, after all, a more important contributor to law and order than is prosecution. If the homes fail, no number of prosecutors, judges or jails could stem the tide of ensuing crime. While the Trammel home is perhaps far from an ideal one, the principle established in this case applies to all accused couples and makes us unwitting partisans in the continuing assaults on the stability of the home--the root of true stability in any society.

Supreme Court, U. S.
FILED
MAY 15 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5705

OTIS TRAMMEL, JR.,
Petitioner

—vs—

UNITED STATES OF AMERICA,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 13, 1978
CERTIORARI GRANTED FEBRUARY 26, 1979

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

1976

3-10 INDICTMENT
W/A issued to Marshal.

3-29 Memo of U.S. Atty . . . Deft. in custody of Marshal in Los Angeles as of 3/16/76 . . . Scheduled to appear before Magistrate 4/6/76.

3-30 Marshal's return on W/A . . . Deft. arrested 3/16/76.

4-15 Advised by Magistrate's Office (Tassopulos, 798-2523) in Los Angeles, Calif. that hearing scheduled for 4/6/76 has been continued to 5/13/76.

5-6 BOND . . . $10,000 Surety . . . executed 3/18/76 . . . Surety: Cora E. Trammell, 8705 Bandera St., Los Angeles, Calif. Case assigned to J. Winner . . . Arr. set 5/14/76.

5-13 Order Appointing Counsel.

5-14 Ordered (FMW Deft. be arraigned . . . Deft. enters plea of NOT GUILTY . . . Case be set for trial . . . Bond cont. eod 5/17/76.

5-19 Signed (FMW) Order granting oral MOTION made 5/14/76, allowing Deft. to return to Los Angeles where he is employed. eod 5/24/76 c.o.m.

5-21 Letter of Deft. to Govt . . . Re: Rule 31.
MOTION of Deft. for Discovery
MOTION of Deft. for Severance

5-26 Trial set week of 6/21/76.

6-4 Hearing (FMW) All Pending Motions . . . Arguments . . . Ordered: Motions for Bill of Particulars denied in part, sustained in part, & parts are confessed . . . Motion of Deft. Roberts for Investigative Costs is denied . . . HEARING Re: Motion to Suppress set for 8:00 a.m. 6/21/76 . . .

Motion of Deft. Trammel for Exculpatory Information is granted . . . Further HEARING Re: Motions is set for Thurs. 6/17/76 at 8:10 a.m. . . . Recess. eod 6/7/76

6-7 Response to Bill of Particulars. c.o.m.

6-17 Hearing (FMW) Motions con't . . . Witness . . . Ordered: Immunity Motion for Eliz. Trammel tentative but not official. eod 6/18/76

6-21 TRIAL TO JURY (FMW) 1st Day . . . Jurors sworn . . . Witness Keenan takes 5th . . . Court signs Order granting immunity to this witness . . . Witnesses . . . Exhibits . . . Eliz. Trammel granted immunity per signed Order of Court . . . Witness . . . Exhibit . . . Court & Jury to recess until 9:00 a.m. 6/22/76. eod 6/23/76

6-22 TRIAL TO JURY (FMW) 2nd Day . . . Witnesses . . . Exhibits . . . Gov't rests . . . Jury excused until 9:00 a.m. 6/23/76 . . . Court & counsel remain to discuss legal matters . . . Court in recess until 6/23/76 at 9:00 a.m. eod 6/23/76

6-23 TRIAL TO JURY (FMW) 3rd Day . . . Defense rests . . . Closing arguments . . . Deft. Freeman moves for a mistrial or for severance—denied . . . Deft. Roberts moves for a mistrial—denied . . . Court instructs jury . . . Marshal sworn . . . Jury retires to deliberate . . . Court & Jury reconvenes in answer to jury's request to have Court's instructions transcribed & read to them . . . Request granted . . . Jury recessed until 9:00 a.m. 6/24/76 . . . Court recessed. eod 6/28/76

6-24 TRIAL TO JURY (FMW) 4th Day . . . Jury deliberates . . . Jury finds Defts. GUILTY as charged in Ind . . . Jury polled & all answer in affirmative . . . Jury excused . . . Sent. deferred . . . Bond con't . . . Recess. eod 6/28/76
VERDICT

6-25 Cy Reporter's Transcript of Jury Instructions.

7-1 MOTION of Deft. for new Trial. c.o.m.
Notice of Hearing (FMW) Motion for New Trial . . . set for 7/9/76 8:00 a.m. c.o.m.

7-9 HEARING (FMW) Arguments . . . Ordered: Motion for New Trial denied. eod 7/12/76

7-12 Sent. set for 7/16/76 at 9:00 a.m.—FMW

7-16 SENTENCING (FMW) Indet. sent.; Deft. committed for treatment & supervision pursuant to 18 USC 5010(b) . . . Appeal Bond set at $10,000. Surety . . . Deft. granted stay of exec. to 7/23/76. eod 7/16/76

Signed (FMW) Judgment and Commitment. eod 7/16/76

7-21 NOTICE OF APPEAL—Due 8/30/76—Conf. 7/27/76—Served 7/21/76.

7-27 Designation of Record on Appeal by Defts/Pltf.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, PLAINTIFF

v.

EDWIN LEE ROBERTS, OTIS TRAMMEL, JR.,
JOSEPH FREEMAN, DEFENDANTS

INDICTMENT—Filed March 10, 1976

21 U.S.C., § 952(a), § 963
18 U.S.C., §2

COUNT I

The Grand Jury charges that:

In July 1975 through November 6, 1975, in Denver and Colorado Springs, in the State and District of Colorado, California, Virginia, Hawaii, the Philippine Islands, Thailand, and elsewhere, EDWIN LEE ROBERTS, OTIS TRAMMEL, JR., and JOSEPH FREEMAN, did knowingly and intentionally import and cause to be imported into the United States of America from Thailand and the Philippine Islands, a controlled substance, to wit: heroin, a Schedule I narcotic, contrary to Title 21, United States Code, Section 952(a) and Title 18, United States Code, Section 2.

COUNT II

The Grand Jury further charges that:

In July 1975 and continuously thereafter up to and including November 6, 1975, in Denver and Colorado Springs in the State and District of Colorado, California, Virginia, Hawaii, the Philippine Islands, Thailand, and elsewhere, EDWIN LEE ROBERTS, OTIS TRAMMEL, JR., and JOSEPH FREEMAN, did wilfully and knowingly combine, conspire, confederate, and agree together with each other and with Janice Leverne Keenan, Elizabeth Ann Trammel, also known as "Teen," Ervin B. Barnes, also known as

"Porkchop," Josephine Flewellen, Carmen Rosa, nee Baez Freeman, and Ben Richardson, Jr., unindicted co-conspirators, and with other persons to the Grand Jury unknown, to knowingly and intentionally import heroin, a Schedule I narcotic controlled substance, in violation of Title 21, United States Code, Section 963, and Title 21, United States Code, Section 962(a).

It was further part of said conspiracy to conceal the importation scheme and the heroin from detection by law enforcement personnel.

It was further part of said conspiracy to use commercial and military airlines and flights to facilitate the importation of heroin.

OVERT ACTS

The Grand Jury charges that in furtherance of the aforementioned conspiracy and to accomplish its objects, the defendants at the time and places set forth did commit the following overt acts:

1. During the summer of 1975, EDWIN LEE ROBERTS, as a member of the United States Air Force at Clark Air Force Base in the Philippine Islands, packaged and caused to be packaged, a quantity of heroin while in the Philippines and caused it to be mailed to himself at his parents' address in the State of Virginia.

2. On or about August 31, 1975, OTIS and Elizabeth TRAMMEL, as a member or dependent of the United States Air Force, who were previously stationed at Clark Air Force Base, flew via a military flight from the Philippines to California, carrying a quantity of heroin. On September 9, 1975, they mailed a letter from California to Carmen Baez who is the wife of JOSEPH FREEMAN, and who was stationed at Clark Air Force Base, Philippines. The letter requested that a message be given to "Free" regarding breaking down their "junk" and referring to "30 thousand an ounce."

3. On or about September 11, 1975, EDWIN LEE ROBERTS mailed a letter from Portsmouth, Virginia to Janice Keenan, a member of the Air Force who was stationed in the Philippines. The letter requested that a message be given to "Freeman" about Roberts having sold

"his stuff at $300.00 per one-half teaspoon" and "I need some more."

4. On September 13, 1975, JOSEPH FREEMAN, a member of the United States Air Force and married to Carmen Rosa Baez, also a member of the United States Air Force, flew by way of a military flight from the Philippines to California. There he met OTIS and Elizabeth TRAMMEL. Later FREEMAN also met with EDWIN ROBERTS and ROBERTS assisted him in "getting rid of some of his stuff." On September 29, 1975, JOSEPH FREEMAN and Elizabeth TRAMMEL flew back to the Philippines by way of commercial airlines.

5. On October 20, 1975, Elizabeth Trammel flew from the Philippines to Thailand where she subsequently met Ervin B. Barnes. She purchased a quantity of heroin from Barnes and was instructed by him as to methods of secreting the heroin on her person so as to prevent discovery on her return trip.

6. On September 28, 1975, EDWIN ROBERTS, then stationed at Peterson Field in Colorado Springs, Colorado, wrote a letter to Janice Keenan in the Philippine Islands which included the statement that ROBERTS had assisted FREEMAN in "getting rid of some of his stuff."

7. On or about October 22, 1975, EDWIN ROBERTS wrote Janice Keenan another letter telling her to tell FREEMAN that ROBERTS had not yet sold FREEMAN'S "stuff" and that he had been forced to throw away "two parts of Freeman's stuff" because he had been "stopped and searched by the cops."

8. On or about October 30, 1975, Elizabeth Trammel left Thailand and returned to the Philippine Islands.

9. On or about November 3, 1975, Elizabeth Trammel secreted 4 ounces of heroin on her person for the purpose of importing into the United States. She was driven to the airport in Manila, Philippine Islands, by JOSEPH FREEMAN. The plan was for Elizabeth Trammel to deliver the heroin to OTIS TRAMMEL in Los Angeles, California, where JOE FREEMAN would pick it up and deliver it to EDWIN ROBERTS in Colorado Springs, Colorado. Elizabeth Trammel's flight stopped in Honolulu, Hawaii, where she was searched and the heroin uncovered and she was arrested.

10. On or about November 5, 1975, Elizabeth Trammel arrived in Denver, Colorado, where she placed telephone calls to EDWIN ROBERTS, arranging for her to make the delivery. On the same date, EDWIN ROBERTS went to Stapleton International Airport, Denver, Colorado, where he accepted the delivery of heroin, which had been brought by Elizabeth Trammel from the Philippine Islands to the United States of America.

A TRUE BILL:

/s/ John J. Noble
JOHN J. NOBLE
Foreman

JAMES L. TREECE
United States Attorney

BY: /s/ Rod W. Snow
ROD W. SNOW
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, *Plaintiff*

v.

EDWIN LEE ROBERTS, OTIS TRAMMEL, JR., JOSEPH FREEMAN, *Defendants*

MOTION FOR SEVERANCE
Filed May 21, 1976

COMES NOW the Defendant, Otis Trammel, Jr., by and through his duly authorized attorneys, Fielder, Mitzner & Wiggins, P.C. and moves this Honorable Court to enter an Order severing the trial of Otis Trammel, Jr. from the other two named Defendants herein and as grounds therefor states as follows:

1. That one of the witnesses endorsed by the Government is an unindicted co-conspirator named Elizabeth Ann Trammel.

2. That Elizabeth Ann Trammel is the wife of the Defendant, Otis Trammel, Jr.

3. That Rod W. Snow, United States Attorney, has advised the defense that he intends to call Elizabeth Ann Trammel as a witness in this case.

4. That although her testimony may be admissible against Edwin Lee Roberts and Joseph Freeman, the other two Defendants in this case, the Defendant, Otis Trammel, Jr., has not waived his right to prevent his wife from testifying against him.

WHEREFORE, the Defendant, Otis Trammel, Jr.,

prays that this Honorable Court enter an Order severing his trial from the trial of the other two named Defendants.

Respectfully submitted,
FIELDER, MITZNER & WIGGINS, P.C.

By */s/* Fred A. Fielder, Jr.
FREDERICK A. FIELDER, JR. #2197
1612 Court Place, #725
Denver, Colorado 80202
573-1036
Attorneys for Defendant,
Trammel

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, *Plaintiff*

v.

EDWIN ROBERTS, ET AL., *Defendants*

REPORTER'S TRANSCRIPT
HEARING ON MOTIONS
Filed December, 30, 1976

Proceedings before the HONORABLE FRED M. WINNER, Judge, United States District Court for the District of Colorado, commencing at or about 2 p.m. on the 17th day of June 1976, in Courtroom E, United States Courthouse.

APPEARANCES

ROD SNOW, Assistant United States Attorney, appearing on behalf of the plaintiff.

ROBERT L. MALMAN, FREDERICK FIELDER, and ERIC PRINGLE, Attorneys at Law, Denver, Colorado, appearing on behalf of various defendants.

[Vol. I, p. 3] PROCEEDINGS

THE COURT: All right, gentlemen, this afternoon we have 76-CR-57 on assorted motions. You gentlemen may proceed.

MR. SNOW: May it please the Court, Rod Snow on behalf of the government. I believe this afternoon is specifically one motion.

THE COURT: That's good.

MR. SNOW: Determination of the competency for the wife to testify.

THE COURT: All right, fine.

MR. SNOW: We have one minor fly in the ointment, Your Honor, the wife will be granted immunity. I just

talked with the Justice Department this afternoon. The immunity is somewhere between Washington and here in the mails. It's been signed. It was signed the 15th of June. I don't believe it will be any problem with her, if it's no problem to the Court.

THE COURT: All right, let's see how we get along.

MR. SNOW: We would call Elizabeth Trammel, Your Honor.

ELIZABETH TRAMMELL

called as a witness by the plaintiff, being first duly sworn, testified on her oath as follows:

[Vol. I, p. 4] DIRECT EXAMINATION

BY MR. SNOW:

Q Would you state your name for the record, please, spelling your last name.

A Elizabeth Ann Trammell, T-r —

MR. FIELDER: Your Honor, I would like to make a statement at this time. By not objecting to her being called at this time, we do not intend to waive any rights we might have in the future.

THE COURT: Fair enough.

A (By the witness) T-r-a-m-m-e-l-l.

Q (By Mr. Snow) and is it Miss or Mrs.?

A Mrs.

Q Mrs. Trammell, where were you in May of 1975?

A Philippines.

Q Anywhere in particular in the Philippines?

A Yes, Clark Air Base.

Q Is that around Manila?

A Yes, down from there.

Q And how long had you been there as of May, 1975?

A A year and a half.

Q And did you get married in May of 1975?

A Yes, I did, the last day, the 31st.

Q May 31?

A Yes.

[Vol. I, p. 5] Q To whom did you marry?

A Otis Trammell, Junior.

Q And approximately when did you leave the Philippines for the first time?

A Coming to the States?
Q Yes, in the summer of 1975?
A The first of September.
Q Around the first of September?
A Uh-huh.
Q Did you take any trips to Thailand before you came back to the United States?
A Yes, I did.
Q Would you tell us approximately when in time you first took the trip to Thailand?
A It was about the last week in August.
Q And what was your reason for going to Thailand?
A My husband had me go pick up some drugs to bring back to the Phillipines.
Q What kind of drugs?
A Heroin.
Q Did you in fact meet anyone in Thailand and pick up some heroin?
A Yes, I did.
Q Did you bring it back to Manila?
A Yes.
[Vol. I, p. 6] **Q What did you do with it?**
A Took it home to my husband.
Q All right. And did you then come to the United States?
A Yeah, we left the next two days.
Q And how did you come to the United States?
A Through Clark Air Base.
Q And was the heroin brought with you to the United States?
A Yes, it was.
Q And by whom?
A Me.
Q What happened when you got to the United States, where did you first stop?
A Went to Los Angeles to my husband's home.
Q Did you or your husband or anyone else attempt to do anything with the heroin that you had brought to California?
A Before we got to the States or after —
Q After you got to the States.
A Yes.
Q All right. Would you tells us what happened, please?
A We had been back about a week and a half and a friend that we had known, Joseph Freeman, called from San Francisco saying that he had arrived in the States and

that he'd be coming down to Los Angeles and my husband was to pick [Vol. I, p. 7] him up at the airport, which he did.

After Freeman had got there and we got settled and all, two days later we set out with the heroin, going to San Bernardino, my husband and Mr. Freeman attempted to sell it there, but they didn't. We stayed there about three or four days.

Then we went to San Diego. Some more of Joseph Freeman's friends there. They weren't able to sell it there.

Sergeant Freeman then went to Virginia, supposedly to sell it.

Q Were you with them when they were attempting to sell this in San Bernardino and San Diego?
A Sometimes.
Q Was anything said by either one of the two parties about two other people wanting to buy it or wanting to sell it or anything.
A Was anything—what was that?
A What happened when you were with them and they tried to sell it?
A Well, Sergeant Freeman had been stationed around those areas before he took his overseas assignment, so he knew friends there, supposedly, and it was just almost like out asking—out-and-out asked in conversation, did they know anybody who might be interested in buying some or did they know where they could sell it.
[Vol. I, p. 8] **Q When they said "some", did they use any particular word for the drugs?**
A Smack.
Q Smack. After you were unsuccessful in Southern California, what if anything did you do?
A Me and my husband left San Diego and went back to Los Angeles.
Q What happened to the drugs?
A One portion of it, my husband tried to sell to his—somebody that was related or in his family, to his sister.
Q All right. And was he successful in doing that?
A The guy took it, but it turned out that my husband didn't get the money that he was supposed to for it.
Q How much did he get?
A $150.
Q For how much did he give?
A An ounce, a full ounce, I believe.
Q An ounce. All right. What happened to the other, did Mr. Freeman take any?

A That was —

THE COURT: Let me interrupt. I am confused.

MR SNOW: Yes, Your Honor.

THE COURT: How much of this does she know as a result of observation and how much does she know as a result of communications made to her by her husband?

[Vol. I, p. 9] MR. SNOW: I will go back, if I may, and clarify that.

THE COURT: Fine, cause I think it makes some moderate degree of difference.

MR. SNOW: Very well, Your Honor.

Q (By Mr. Snow) Let's go back to when you and your husband first arrived in California from the Philippines and you had the drugs with you, okay?

A (Witness nods head)

Q What specifically did you see, versus what you heard? Do you understand what I'm saying?

A That I gave it to him and he kept it in his house.

Q All right.

A After we got there.

Q All right. Now he talked about—after Joseph Freeman arrived, did you hear Joseph Freeman and your husband discuss what was to be done with that heroin?

A No, not right then. Just that they were looking for a buyer.

Q They were looking for a buyer. Now was this a conversation that you heard or what, that they were looking for a buyer?

A Well, yeah, they never did just point out or say anything while I was around.

Q They didn't say anything about it while you were [Vol. I, p. 10] around?

A No.

Q What was it that you either saw or heard next, then, regarding to go to Southern California?

A That maybe some of his friends knew somebody that he could sell it to.

Q This is what Joseph Freeman was saying?

A Yeah.

Q And was your husband present when he was saying that?

A He was talking to my husband when—deciding on what they were going to do with it.

Q Was this in your presence?

A Yes, it was.

Q Was anyone else present?

A No.

Q Where did this take place?

A My husband borrowed his father's mobile home for us to go to San Diego and San Bernardino.

Q All right, and did you ride to San Bernardino with your husband?

A Yes, I did.

Q Was anyone else present?

A Joseph Freeman.

Q While you were on your way to San Bernardino, were there any conversations regarding, specifically, drugs?

[Vol. I, p. 11] A Not that I remember.

Q Did you see the drugs on the way to San Bernardino?

A Yes.

Q Who had them?

A He stored them in the mobile home.

Q Who is "he"?

A My husband.

Q Did you see him do that?

A Well, I knew where he had put them.

Q Did you actually see it yourself?

A Yeah, I guess you could say that.

Q I am sorry. I didn't hear.

A Yes.

Q Yes, you saw them yourself. Did you see him put them there or you just where they were?

A I saw where they were.

Q Now when you got to San Bernardino, did you see anyone take them from there, take them outside the mobile home?

A Did anyone do what?

Q Did anyone take them from the mobile home to take them outside and sell in San Bernardino?

A No, no—no.

Q Did you go with anyone or hear anyone solicit to purchase smack?

A During that time my husband and Freeman talked to [Vol. I, p. 12] his friends and, you know, just asked did they know anybody.

Q Was this in your presence?

A Yes—well, it was an open conversation.

Q By open, do you mean there was more than you and your husband and Mr. Freeman?

A Yes. The people that Mr. Freeman knew.

Q And did your husband take part in those conversations?

A Yes, he did.

Q All right. Now when you got to San Diego, was this same type of thing repeated?

A Yes, but his friend there told him he didn't want to have anything to do with it.

Q Who was his friend? Was it Mr. Freeman's friend or your husband's?

A Yes, Mr. Freeman's friend. I got a chance to meet him, though. He's from Chicago also. He's in the Navy.

Q Were you present when he told Mr. Freeman that he didn't want anything to do with the smack?

A Yes, and his wife was, also.

Q Was your husband?

A My husband, too.

Q All right. Now as to when Mr. Freeman took the drugs, did you see him actually take them?

A No. I was only under the impression that he was taking it to Virginia.

[Vol. I, p. 13] Q Did he tell you that or did you overhear him tell your husband that?

A Overhear him and my husband talking, and me being there.

Q Was that in the mobile home or somewhere else?

A In the mobile home and in his friend's house.

Q Was anyone else present besides the three of you when that was being discussed?

A Not that portion, I don't think.

Q All right.

A She—his wife knew that he was going to Virginia. She knew that we had heroin so I suppose she did know.

Q Was she present, Freeman's wife?

A No. I'm speaking of Richard's wife, his friend.

Q Oh, all right. So was Richard present when there was discussions about going to Virginia?

A Yeah, because him and my husband took Freeman to the airport.

Q So, did you got to the airport?

A No, me and his wife stayed home.

Q Did you see your husband get into the car to take him to the airport?

A Uh-huh (witness nods head).

Q Did you see the transfer of drugs at any time?

A Not then.

[Vol. I, p. 14] Q Did your husband tell you that the drugs had been transferred?

A Yes.

Q Did anyone else tell you that they'd been transferred, did Freeman, for instance?

A He didn't have to, they weren't in the mobile home any more.

Q All right.

A That's the last that I seen them.

Q Do you know precisely when they left the mobile home? Were you present when they were there one time and the next time they weren't?

A No. When—as far as them taking it out and getting ready to—him getting ready to fly to Virginia that night, no. I didn't see that.

Q All right. Did you and your husband have any conversations while Mr. Freeman was gone regarding what was going to happen to the drugs that he had taken to Virginia?

A He was saying that he hoped that he got the money for it.

Q All right. Did Mr. Freeman come back to California?

A Yes, he did.

Q Did you see Mr. Freeman back in California?

A Yes.

Q Did you see if he brought any money back?

[Vol. I, p. 15] A Yes.

Q What did you see happen with money?

A He gave it to my husband.

Q You saw him give money to your husband?

A Yes.

Q How much?

A It was $3500.

Q $3500?

A (Witness nods head)

Q Did he have any conversations with you and/or your husband at that time when he gave over the money, as to where he had gotten it for instance?

A That he had seen Ed in Virginia.

Q Who was Ed?

A Ed Roberts.

Q Okay, did you know who Ed was?

A Yes.

Q Who was Ed?

A Well, he's a friend of mine that was in the Air Force, too. He lived next door to us.

Q Where?

A In the Philippines.

Q All right. So Mr. Freeman told your husband and

you—was he talking to you at the same time or was it just a conversation between the two and you just happened to be [Vol. I, p. 16] there?

A I'd been around. I'd always been around when they were talking.

Q So he told your husband he met Roberts and that's how he got the money?

A (Witness nods head)

Q Did he tell you why he had $3500 from Mr. Roberts?

A From the sale of drugs.

Q Was there any discussion at that time as to what was going to happen to the $3500 that would involve your action?

A Yes, my husband say he wanted me to go back over again, since that he had lost that ounce with that guy that he had messed around with and —

Q Did any of this conversation take place with Joseph Freeman present?

A Yes.

Q So your husband wanted you to go back to the Philippines with Joseph Freeman?

A Right.

Q And did you do that?

A Yes, I did.

Q Did you see who paid for the tickets?

A My husband paid for them.

Q For your ticket and for Mr. Freeman's ticket?

A Yes.

[Vol. I, p. 17] Q What happened when you got back to the Philippines?

A Sergeant Freeman was in process of moving from an apartment that he was staying in across the street to a new house. So I stayed with him about two days and then he made arrangements for me to stay with some friends that I also knew, because he didn't have his house furnished. He had only one accommodations for him and his wife, a bed, so I stayed with friends.

Q Did you make another trip to Thailand?

A Yes, I did.

Q Did anybody give you instructions as to what you were supposed to do when you got there?

A My husband and him had told me to just bring it like I had before when I went the first time.

Q And when they told you this, did both of them tell you this together or separately?

A I can't really remember.

Q All right. Did you in fact make another trip?

A Yes.

Q And did you pick up more heroin?

A Yes.

Q And what did you do with it?

A I brought it back to the Philippines.

Q All right. And did you see Mr. Freemand again when you brought it back?

[Vol. I, p. 18] A Immediately after I returned.

Q Did you have any conversation with him regarding the heroin?

A He just inquired about how my trip was and what I did. He'd keep it, make sure everything was okay.

Q By keeping it, you mean the drugs?

A Right.

Q Did you give the drugs to him?

A Right.

Q All right. Did you get the drugs back from him at any time?

A Two days later.

Q Under what circumstances? Why did he give them back to you?

A He was—wanted me to bring them to the States. He had planned on coming back with me. That's what he told my husband before we even came over together, that he would take care of me, and you know, kind of make sure nothing happened to me and that he would return back to the States with me after I had made the pick up.

That same day that I had flew in from Thailand again back to the Philippines he said that he didn't think he'd be able to come back with me, but he would return in a couple of weeks.

Q Did he tell you what you were supposed to do with [Vol. I, p. 19] the heroin?

A Well, he hadn't discussed it with my husband, but since my husband goofed, he wanted me to take them to Mr. Roberts, but I told him that I'd be stopping to see my husband before I went—came to Denver, because at that time that's where Mr. Roberts was.

Q Did you leave the Philippines and come to the United States?

A Yes.

Q Did you get stopped in Hawaii?

A Yes, I did.

Q Were you searched?

A Yes.

Q And were the drugs found?
A Yes.
Q Did you then come to the United States in company with some agents and deliver the drugs to Mr. Roberts?
A Yes, we did.
Q Where did that take place, the delivery?
A Stapleton Airport.
Q All right.
MR. SNOW: May I have a moment, please, Your Honor?
(Discussion off the record between Mr. Snow and advisory witness.)
MR. SNOW: May it please the Court, there are a [Vol. I, p. 20] great deal of detailed questions that we can go into, but for the sake of the hearing, I don't believe it's necessary. I have given the Court, I believe, the gist of her testimony and defense counsel has got a copy of her previous statements. The government's prepared to have cross-examination and to argue basically on that.
THE COURT: Your may cross-examine.
MR. FIELDER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. FIELDER:
Q You've indicated in a statement previously supplied to us, that you're a user of heroin, is that right?
A I smoked heroin before.
Q Quite a bit?
A Depends on what you mean, quit a bit.
Q Well, maybe a hundred times while you were in the Philippines?
A Not—not a hundred times. It makes you sick.
Q Kind of makes your head funny, too, doesn't it?
A (Witness nods head)
Q What would you say, 75 times?
A I'd say from the time I started associating with my husband up until the time we got back to the States.
Q All right. So that was for a period of about a [Vol. I, p. 21] year, year and a half?
A About nine months.
Q About nine months, all right. Now, you indicated that you were married to your husband on 31 May 1975, is that correct?
A Right.
Q And you're still married to him at this time?
A Yes, I am.

Q You were married in what place in the Philippines?
A We were married at Bible Baptist Church, downtown Angeles City.
Q All right, now you were given some kind of a misdemeanor deal in Honolulu, is that correct?
A Right.
Q You entered a plea of guilty to that?
A Right.
Q All right, now, evidently, there has been some other grant of immunity that has been given to you, is that right?
A No.
MR. SNOW: Please the Court, the immunity has not been specifically granted yet, as I explained.
THE COURT: From my understanding, Mr. Snow's statement is that he's been assured that the Justice officials of the government will grant immunity and when the documents arrive, it will presumably be presented to me that this has [Vol. I, p. 22] been told to the witness and that the witness is testifying in reliance upon a grant of immunity. I don't think there's been any formal grant at this time.
MR. SNOW: That's correct, Your Honor.
Q (By Mr. Fielder) I meant—you understand that a grant of immunity is going to be given to you then, is that correct?
A Right now I don't even know what that is.
Q Well, they tell you you couldn't be prosecuted for anything you're stating here today.
A I was told when I was apprehended that if I pointed out the people and made a bust that was successful, that, you know, I'd get misdemeanor. It wasn't really a promise. They just said misdemeanor and probation and—but I'd have to fully cooperate during this whole thing involved.
Q All right, then in addition to that, thought, did he tell you anything you state here now while testifying here in Court today or in the future, if you testify in front of a jury, you wouldn't be prosecuted for anything that comes out of that?
A Right.
Q He's told you that?
A (Witness nods head)
Q Did he tell you you could lie and that you wouldn't get prosecuted for that?
[Vol. I, p. 23] A No, I was to tell the truth and only the truth.
Q Okay. Now you've indicated that on two separate occasions, I think the first time was in the latter part of August, 1975 you carried heroin back into the United States?

A Yes.
Q Where did you carry this?
A On my body.
Q Where on your body?
A Underneath my underwear.
Q All right. Now do you recall writing a letter on the 9th of September, 1975 on which your husband also wrote some note on a separate page. Do you recall doing that?
A After me and my husband returned to the States, I wrote my friends back in the Philippines, Carmen Ann Freeman especially, letting them know that we had gotten to the States all right, and just what we were dong.
Q All right. And you indicated in there something about this selling heroin, is that correct?
A (Witness nods head)
Q That was done—excuse me.
A I don't remember the wording that I might have put, but I don't think I mentioned drugs.
Q All right. And that was done in your own handwriting, is that correct?
A Right.
[Vol. I, p. 24] Q Now did you then at some point ask your husband to put an insert in there? He wrote a separate paragraph in there, didn't he?
A That was to a maid. That might have been to the maid. We was real close to our housegirl. Well, we wrote her a letter. That's the only one I remember writing.
Q Well, did he include in this letter to Carmen Baez Freeman a separate note?
A No, not one that I mailed out.
Q All right. Then the entire letter was in your own handwriting, is that correct?
A (Witness nods head.)
Q Nobody else was present when this letter was written or discussed, were they?
A My husband was there with me.
Q Just the two of you?
A Yes. We were watching TV one night and I wrote it.
Q All right. Now who is Janice Laverne Keenan?
A She's a friend of mine. She moved in next door with Mr. Roberts during the time that me and Carmen Ann Freemen and my husband was staying there.
Q And this was in the Philippines?
A Right.
Q And what part did she have in this entire transaction?
A After I returned back from Thailand to the Philippines [Vol. I, p. 25] the second time—the second time, the day also that I arrived when I gave Mr. Freeman the drugs, he asked did I see Jan, meaning did I see her in Udorn, Thailand; and I told him no. And he said I should have seen her. He don't know how I missed her, that she was there, too, to see the same person, I suppose, that I see when I was there.

Q Who is Pork Chop?
A That's Mr. Barnes. Ervin Barnes.
Q Who is he?
A The friend in Thailand that I picked the drugs up from.
Q He was the supplier of the drugs in Thailand?
A He got them from a Thai national. I had—when I got there, after I had been there a couple days, well, he was staying downtown with his girfriend and another Thai national came over, a male, with three ounces, but I think he had told him previously that it was for four, but he only brought three and that he'd pick up another one later.
Q Was the name of Barnes given to you by your husband?
A Yeah, and he, you know, I knew Barnes. After he mentioned him and talked about him, I happened to be stationed in Del Rio, Texas, during '72 up until '73 and occasionally I got to meet Mr. Barnes and his wife. I didn't get to know then. I had seen him. I really hadn't even talked to him for a length of time.
[Vol. I, p. 26] Q All right.
A But I knew him.
Q He, evidently, was stationed in Thailand at this particular time?
A Yes.
Q Your husband had mentioned his name to you?
A Right.
Q As a guy to go to to get the heroin?
A Yes.
Q Was anyone else present when you husband gave you this information?
A Sergeant Freeman.
Q You were all together then?
A Carmen, too, but she wouldn't be, you know, really—I don't think listening to that much what they were saying.
Q Who was Josephine Flewellen?
A Yeah. She is a dependent wife that I got to meet during my tour of the Philippines.
Q She was in the Philippines, also?

A Yes.
Q Her husband is in the military?
A Right.
Q What part did she have in this?
A Only that she accompained me and Mr. Freemand and a girlfriend that I had stayed with, Marilyn Crackett, to the [Vol. I, p. 27] airport in Manila to come back to the States.
Q And who is Ben Richardson, Junior?
MR. SNOW: May it please the Court, at this time we would object. I think it's getting afield from the motion.
THE COURT: Sustained. This hasn't got anything to do with what's before the Court. This is just a discovery deposition now.
MR. FIELDER: Well, Your Honor, I thought I might possibly get into areas that were privileged. This is the only thing I have seen he was going on. I have seen nothing yet—
THE COURT You do anything you want to get into the other areas of privilege, but let's limit to that. There is not going to be a discovery deposition in a criminal case.
MR. FIELDER: Thank you, Your Honor.
THE COURT: If you wish to ask about communications between husband and wife, outside the presence of a third person, you go right ahead and ask to your heart's content, but the identity of people doesn't matter.
If the communications were made in the presence of John Doe, that is all they have to show and who John Doe is doesn't matter unless there's a dispute as to whether there was a third person present.
MR. FIELDER: Very well.
Q (By Mr. Fielder) On your trip back to the United [Vol. I, p. 28] States after you'd gone over there, on your second trip back, all right? Again, at that time—at the time you were apprehended, had a quantity of heroin with you, correct?
A Right.
Q Now that plan at that time was to deliver the stuff to Roberts in Denver or was it to deliver it to Otis in Los Angeles?
A Freeman had just said to take it to Ed, not to let Otis, you know, just do away with it. Because he had messed up the first time. And he only discussed that I think with me, not with my husband.
Q All right, you had a discussion with your husband prior to going back over there, though, is that correct?
A (Witness nods head)

Q And your husband paid the money for the air fare?
A Right.
Q That was our of the money you obtained from selling it back east?
A Right.
Q All right. You had a discussion with your husband at that time as to where you were to deliver the stuff once you get back to the States?
A No. See Freeman had told Otis that he was going to come back with me. So Otis was just thinking that both of us would probably come back to L.A., I guess.
[Vol. I, p. 29] Q So there was no prearranged plan?
A No.
Q Did your husband ever tell you that Roberts had notice that they were coming back to Denver and it would be delivered to Roberts?
A No.
Q Now, on your first trip back with your husband, you had the heroin in your possession and you discussed with him at that time what you were going to do once you got back, how you were going to sell it?
A My husband had told me the reason why I guess I did it, he had told me that he already know—knew people at home that had dealt in smack and it wouldn't be—he was saying it wouldn't be no problem, you know, to get rid of it when we got back.
Q All right. This was in conversation between the two of you on the way back home?
A That was before—before he even sent me over to Thailand.
Q I am talking about the—before the first trip back.
A Before the first trip?
Q Before you went to Thailand, this occurred?
A Right.
Q When did this occur and who else was present?
A Only him and me in our bedroom in the Philippines.
[Vol. I, p. 30] Q Just the two of you and nobody else?
A Right.
Q Now was this ever discussed, that same conversation in the present of anybody else?
A Yeah, he told Freeman that he knew some heavy people in L.A. that it wouldn't be no problem. He made it sound, all you have to do is, if you just have some, and we get back to the States he's sell it and just make a whole lot of money.
Q All right, now, regarding that first sale, that was

made back east, your husband then communicated to you the fact that there had been a sale, is that correct?

A We didn't know that there had been an actual sale and that it had been successful, unless Freeman came back with the money.

Q All right, then he appeared in the present of both of you, then, is that right?

A And his family and my husband's family.

Q With the $3500?

A Yes, but my husband's family didn't see the money. Only me and him, and Freeman.

MR. FIELDER: Excuse me one second, Your Honor.

Q (By Mr. Fielder) All right, no on the first trip back, did your husband ever mention to you the name of Roberts as a possible receiver of these items?

A No, he didn't.

[Vol. I, p. 31] Q On any other occasion, did this occur?

A We only found out about Ed when Freeman came to the States, as far as him being able to make a sale.

Q All right. Now, you've indicated then that you had the marriage to your husband 31 May 1975, and you are presently married to him at this time, is that correct?

A Yes, I am.

MR. FIELDER: All right, I have no further questions, Your Honor.

THE COURT: Further cross-examination. Redirect.

MR. SNOW: Just a couple, if I may, Your Honor.

REDIRECT EXAMINATION

BY MR. SNOW:

Q As to—you were asked on cross-examination, you were married on the 31st of May 1975, is that correct?

A Right.

Q Did any conversations take place regarding drugs involving your husband and Mr. Freemand and Mr. Roberts before the date of your marriage?

A No.

Q Did you at any time overhear them discuss anything about bringing some smack or heroin back to the United States?

A No, only that it would make a lot of money if they did.

[Vol. I, p. 32] Q I'm sorry, explain that please.

A There had been conversations for a long time, a lot of people saying that there could be a lot of money made off of it.

Q At any time did these conversations involve your husband?

A Yeah, he was around.

Q Mr. Freeman?

A Right.

Q Mr. Robert?

A Ed—Ed didn't come over our house. If he came over, it was only to smoke or something. He didn't say anything in front of me as far as a transaction.

Q What is the status of your marriage now?

A Just married.

Q Are you seeking a divorce or are you about to get a divorce or anything like that?

A He just said that I would go my way and he would go his.

Q By "he" do you mean your husband?

A Right.

MR. SNOW: Thank you. No further questions, Your Honor.

THE COURT: All right, is there any further cross-examination?

[Vol. I, p. 33] MR. FIELDER: No, Your Honor.

THE COURT: Do you want to argue about it or what do you want to do?

MR. FIELDER: Well, yes.

MR. SNOW: May the witness step down, Your Honor?

THE COURT: Yes, you may step down.

(Witness excused)

MR. FIELDER: Your Honor I would just cite the case of *United States of America v. Apodaca*, 522 F.2d 568, decided August 22, 1975, the Court went into two areas of this privilege. I think Mr. Snow has succeeded in invading one of the areas, but hasn't succeeded in invading the other. The first area being if there are privileged communications between the husband and wife and possibly another person is present or they are disclosed to somebody else, then you can't raise the privilege.

The second area of it now is we have a right to prevent a spouse from testifying—Otis has the privilege of preventing Elizabeth from testifying unless he gets on the stand.

THE COURT: No, you're confusing a statute similar to the Dead Man's Statute in Colorado with a spousal privilege

statute. In Colorado—and I decline to comment whether this is or is not applicable in the federal court in Colorado. I'd [Vol. I, p. 34] just as soon avoid that problem—let's assume we're in a Colorado state court, you can prevent a witness from even being sworn, from stating their name, if you're objection arises under the Dead Man's Statute. But that is a totally different concept than privilege.

And the reason for that is this: The Colorado statute says that under the Dead Man's Statute, the witness is not competent. There is nothing in any common law privileges which goes to the competency of the witness. It goes only to the right of the witness to testify.

So I do not agree with you on a husband and wife privilege statute. If you were here under the Dead Man's Statute, I would have to face up to the very difficult question of whether that Colorado competency statute does or does not apply in the federal court. I have never had to pass on it. I have argued the matter as a lawyer to four different district judges, two of them rules one way and two of them ruled the other, and I've argued both sides of it. So I know a little bit about it.

I can't accept your argument.

MR. FIELDER: Referring, in addition to the *Apodaca* case, to the U.S. Supreme Court case of *Hawkins v. United States*, 358 U.S. 74, which states the purpose of this is you should not inflame an existing marriage by having one spouse testify against another, it even—

[Vol. I, p. 35] THE COURT: No, no, I don't agree with you. I think it says you should not inflame an existing marriage by having one spouse testifying against another as to the confidential communications made during the course of the marriage.

I do not think the case in any way changes the long established rule that the confidentiality does not exist where the communication is made in the presence of a third person, and I do not think it changes the established rule that there is no confidentiality as to acts observed.

It is limited to communications, oral or written, or, I suppose, by sign language. I suppose there would have to be that qualification to acts observed. If the act was intended to be a communication, I suppose the confidentiality would apply to that.

But I do not agree with you that the long recognized concept that you should not destroy a marriage by having one spouse testifying against another as to something said in

confidence, I cannot agree that it means they cannot testify where the confidence has been breached.

MR. FIELDER: Well, yes. But, Your Honor, in that type of situation these privileges that he brings out would even sustain, would survive, an existing marriage.

I'm talking about a marriage that is in existence and valid at that particular time.

THE COURT: So am I. So am I.

[Vol. I, p. 36] MR. FIELDER: And this *Apodaca* case makes a clear distinction between these two and it gives him an absolute right to keep her off the stand unless he consents, then these are the words they use in that case.

THE COURT: I don't agree with you.

MR. FIELDER: Well, Your Honor, that is all I have to argue. I am relying on these cases, obviously—

THE COURT: All right. Well, gentlemen, I will make a ruling that counsel are going to have to, in utilization of their own questions, apply. As far as I am concerned, the witness can testify to any act observed by the witness before or during the marriage, with the qualification that if the act was intended as a communication, then the witness can testify to that act only if the communication was in the presence of a third person.

That is, if there were a motion between the witness with her hand indicating to the defendant that he should come forward or that he should stop or that he should get down, to hide, that I would regard as an act intended as a communication.

Any other act observed by the witness, she can testify to. The witness can testify to any communication made or during the marriage, which was made in the presence of a third person, as long as the presence of that third person was known by both of the parties to the marriage.

I do not suggest that there could be a waiver of the [Vol. I, p. 37] confidentiality if you hid a person in the room to overhear a conversation. I don't mean that. But where the communication is made in the presence of a third person, whose presence is apparent to both husband and wife, there is, as I see it, no privilege.

Now the government will be held strictly to not asking any question about conversations which do not come within that exception. That is, if the government knows of a communication made in private between husband and wife, you're not going to be permitted to go into that, if it was made out of the presence of anybody else.

If the defendants want to go into that, they are going to get in trouble, if anybody does it accept the defendant whose wife is involved. Or we're all going to be in trouble.

If you're going to do that, then I suppose we have got real *Bruton* problems and we probably will have to order severances.

If the defendants intend to do that, I want them to so state now, because if the defendants intend to go in to something they learned about that is a confidential communication, if anyone other than the husband intends to go into that then I think we would have real problems and I think that we'd have to face up to them now or have a mistrial and I want to know now if that's going to happen.

[Vol. I, p. 38] MR. MALMAN: Your Honor, may I approach the bench on behalf of Mr. Roberts:

THE COURT: Sure.

(At the bench)

MR. MALMAN: This refers to the motion for issuance of a subpoena and I don't mind that Mr. Snow is here because I did talk to Miss Keenan in the Phillipines. She did make some statements to me that, in my mind, would tend to exonerate Mr. Roberts of some of the charges in the indictment, but she said she was subpoenaed by the people and she was being brought to Denver. If that's the case, I don't need to subpoena her.

THE COURT: All right, fine.

MR. SNOW: She is here.

THE COURT: She is here.

MR. MALMAN: She is here in town?

MR. SNOW (Nods head)

(In open court)

THE COURT: Do any defense counsel intend to go into communications between husband and wife?

MR. PRINGLE: Your Honor, from any information we have at this time, we do not.

MR. MALMAN: Your Honor, I am not sure at this time if the confidential statements between Mr. and Mrs. Trammell would apply to my client, Mr. Roberts.

THE COURT: What do you mean, you haven't got any [Vol. I, p. 39] privilege.

MR. MALMAN: No, but I'm saying—

THE COURT: Mr. Roberts doesn't have any privilege as to what Mr. Trammell told his wife.

MR. MALMAN: But if I were forced to cross-examination to get into that, then it would certainly affect Mr. Trammell.

THE COURT: Now wait a minute. Get into what?

MR. MALMAN: Get into what Mr. Trammell told Mrs. Trammell about Mr. Roberts.

THE COURT: In confidence? Mr. Malman, if you're intending to to do that, I have no choice. We will set your defendant for trial separately first. And we'll get him out of the way. I can't see how that could possibly help you.

MR. MALMAN: Well, Mrs. Trammell—

THE COURT: And I can't see how it would help your client. What he said about her or your client, hasn't got anything to do with it. But I'm not going to risk error in this case. I think it's a little wierd, but that's all right.

MR. MALMAN: Mrs. Trammell made quite a few assumptions today that she supposed that Mr. Freeman—

THE COURT: Just tell me, are you going to do it? Are you going to do it?

MR. MALMAN: I don't know if it's going to be necessary to do it. I do think there's a good possibility.

[Vol. I, p. 40] THE COURT: Let me know before the trial starts.

MR. MALMAN: It's possible that I may have Mr. Roberts take the witness stand.

THE COURT: I want one thing understood. I want that question answered before the trial starts and if it isn't and the trial starts and I'm forced to declare a mistrial, the entire cost will be assessed against you personally. Now is that clear?

MR. MALMAN: Yes, it is, Your Honor.

THE COURT: All right.

MR. MALMAN: I would also make known to the Court that there's a good possibility that Mr. Roberts would take the stand and I think the other defendants might have something to say about that.

THE COURT: Why? It's conspiracy, isn't it?

MR. MALMAN: Well, I just want to make it known so that the Court and the other defendants—

THE COURT: Well, it's a conspiracy, isn't it?

MR. MALMAN: It's allegedly a conspiracy.

THE COURT: All right, then *Bruton* doesn't apply, does it, to a conspiracy case? Does it?

MR. MALMAN: No, it doesn't.

THE COURT: All right. So what's your problem?

All right, now when are you going to be able to advise United States Attorney and the Court as to what you're [Vol. I, p. 41] going to do on going into these confidential communications?

Mr. Snow, do you agree with what I am saying?

MR. SNOW: I do, Your Honor.

THE COURT: All right, when are we going to be advised?

MR. MALMAN: Well, I have spoken to one of these witnesses that's a witness, Mrs. Keenan.

THE COURT: It's set for Monday morning.

MR. SNOW: Right, Monday morning we have a motion to suppress.

THE COURT: Well, I guess you'll know by 8 o'clock and we'll either go to trial against one of them or all of them and we can keep the jury occupied. But we'll go against yours first, if we don't go against all of them, so you be sure to be ready.

MR. MALMAN: I will be ready, Your Honor.

THE COURT: All right.

MR. SNOW: Your Honor, may I ask if there were a severance, would we try both cases in the same week. I know the Court has a lot of cases.

THE COURT: I suppose if you have the endurance.

MR. SNOW: I think I can keep up with Your Honor.

THE COURT: We may have to get another court reporter, as you gentlemen know, I get here at 6 and if you have the witnesses, we will get them tried.

[Vol. I, p. 42] MR. SNOW: We have the witnesses here from the Philippines.

THE COURT: We will start at 6 and run to 10.

MR. SNOW: This is all right with me, Your Honor.

MR. FIELDER: Your Honor, I wonder if I can read something into the record?

THE COURT: Sure.

MR. FIELDER: Citing from the *Apodaca* case, 522 F.2d 568, where the court has stated in this case on page 570: However the federal courts recognize two distinct privileges arising out of marital relationship, the first is previously noted, bars the testimony of one spouse as to confidential communications of the other, citing the *Hawkins* case which I previously cited. Second bars one spouse from testifying adversely to the other unless the other spouse consents.

THE COURT: Yes, I know. Do you want a couple more cases?

MR. FIELDER: Oh, I've got substantial—

THE COURT: I know, but you're reading something into that language that I do not believe the Tenth Circuit intended.

MR. FIELDER: All right. Your Honor, they cite the

Hawkins case which came out of the Tenth Circuit, which came out of the Supreme Court.

THE COURT: I know, but I don't read the language [Vol. I, p. 43] the way you do.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, *Plaintiff*

v.

EDWIN LEE ROBERTS, OTIS TRAMMELL, JR. AND JOSEPH FREEMAN, *Defendants*

TRANSCRIPT OF TRIAL PROCEEDINGS
June 21, 1976

Proceedings before the HONORABLE FRED M. WINNER, Judge, United States District Court for the District of Colorado, commencing at or about 8 a.m., Monday, June 21, 1976, in Courtroom E, United States Courthouse, Denver, Colorado.

APPEARANCES:

ROD W. SNOW, Assistant United States Attorney, appearing on behalf of the plaintiff.

ROBERT MALMAN, Attorney at Law, appearing on behalf of the defendant Edwin Lee Roberts, who was also personally present.

FREDERICK A. FIELDER, JR., Attorney at Law, appearing on behalf of the defendant Otis Trammell, Jr., who was also personally present.

ARTHUR M. SCHWARTZ, ERIC PRINGLE, RICHARD BACON, Attorneys at Law, appearing on behalf of the defendant Joseph Freeman, who was also personally present.

[RENEWAL OF OBJECTION TO THE TESTIMONY OF ELIZABETH TRAMMEL AND THE BEGINNING OF HER TESTIMONY]

[T. Vol. III, p. 112] ELIZABETH TRAMMEL,

called as a witness by the plaintiff, being first duly sworn, testified on her oath as follows:

MR. FIELDER: Your Honor, at this time I would again like to state to the Court, we object to this witness being even called into the courtroom by the prosecutor. She is an adverse witness and she is called by the prosecutor.

We object to her giving any testimony absent our giving consent to her testifying since there's a valid marriage. I would reference—and we have given no consent, Your Honor—I would reference the authorities we gave at the hearing last Thursday.

THE COURT: And you will receive exactly the same ruling. I don't agree with you and your objection will be noted and overruled.

[T. Vol. III, p. 113] MR. FIELDER: And I would state we have a continuing objection.

THE COURT: Well, to her testifying, you may have a continuing objection, but as to any particularized objection on any single question, you must state your objection.

MR. FIELDER: I will, Your Honor.

THE COURT: All right.

DIRECT EXAMINATION

BY MR. SNOW:

Q Would you state your name for the record, please, ma'am, and spell your last name.

A Elizabeth Ann Trammel.

Q And are you married, please, Elizabeth?

A Yes, I am.

Q To whom?

A Otis Trammel, Jr.

Q Where did you live in the spring and the summer of 1975?

A Angeles City, Philippines.

Q At that time were you married to Otis?

A I married Otis on the 13th of May, '75.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, *Plaintiff*

v.

EDWIN LEE ROBERTS, OTIS TRAMMEL, JR.,
JOSEPH FREEMAN, *Defendants*

VERDICT

We, the jury in the above entitled action, upon our oath, do say we find the defendant, OTIS TRAMMEL, JR., guilty, as charged in Count I, and guilty, as charged in Count II of the Indictment herein.

Dated this 24th day of June, 1976.

/s/ [Illegible]
Foreman

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-57

UNITED STATES OF AMERICA, *Plaintiff*

v.

EDWIN LEE ROBERTS, OTIS TRAMMEL, JR.,
JOSEPH FREEMAN, *Defendants*

JUDGMENT AND PROBATION COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date July 16, 1976.

WITH COUNSEL Frederick A. Fielder, Jr.
PLEA entered: NOT GUILTY
There being a verdict of GUILTY.

Defendant has been convicted as charged of the offenses of import a Schedule I controlled substance (Heroin), in violation of Title 21, U.S. Code, Section 952(a) and Title 18, U.S. Code, Section 2; conspiracy to import a Schedule I controlled substance (Heroin), in violation of Title 21, U.S. Code, Section 963, 962(a).

The Court finds that the defendant is youth offender under Title 18, U.S. Code, Section 5005, et seq.,

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for treatment and supervision for an indeterminate period of time in lieu of a definite term of imprisonment pursuant to the Federal Youth Corrections Act, Title 18, U.S. Code, Section 5010(b), until discharged by the Federal Youth Corrections Division of the United States Board of Parole, as provided in Section 5017(c) of Title 18, U.S. Code. This sentence is imposed as to Counts 1 and 2, Count 2 to run concurrent with Count 1.

IT IS FURTHER ADJUDGED that the defendant be granted a stay of execution to July 23, 1976.

/s/ Fred M. Winner
FRED M. WINNER
U. S. District Judge

Date: July 16, 1976

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 76-1834

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

vs.

OTIS TRAMMELL, JR., *Defendant-Appellant*

FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(D.C. No. 76-CR-57)

OPINION-October 11, 1978

Joseph F. Dolan, United States Attorney (James L. Treece, former United States Attorney, and Rod W. Snow, Assistant U.S. Attorney on the brief), for Appellee.

Frederick A. Fielder, Jr., Fielder and Wiggins, P.C., for Appellant.

Before McWILLIAMS, BARRETT and McKAY, Circuit Judges

BARRETT, Circuit Judge

Otis Trammel, Jr. appeals his conviction, following a trial by jury, of the offenses of importation of heroin, 21 U.S.C.A. §952(a), and conspiracy to import heroin, 21 U.S.C.A. §§962(a), 963 (1970). Trammel was tried jointly with two co-defendants, Edwin Lee Roberts and Joseph Freeman. The three had been charged, by indictment, with importation and conspiracy to import heroin.

The three were charged with conspiracy to transport heroin from the Philippines to the United States and with the actual importation of heroin. None of the three defendants testified at trial. The government's case was substantially anchored to the testimony of two unindicted co-conspirators, Janice Keenan, a friend of Edwin Lee Roberts, and Elizabeth Trammel, wife of appellant Otis Trammel, Jr. Janice Keenan and Elizabeth Trammel had been granted immunity from prosecution in return for their testimony.

Prior to trial, appellant moved to sever his trial from that of Roberts and Freeman, or, in the alternative, to

prevent his wife, Elizabeth Trammel, from testifying against him.

On appeal, Trammel contends that the trial court committed reversible error by allowing his wife to testify against him over his objection and without his consent. He asserted, of course, the husband/wife privilege which prevents one spouse from giving testimony adverse to the other without his or her consent. We hold that the trial court did not err in admitting the testimony of Elizabeth Trammel.

The court did exclude evidence of confidential communications between the Trammels. However, the court denied Otis Trammel's assertion of the husband/wife testimonial privilege.

Trammel argues that the trial court erred in admitting the testimony of his wife, Elizabeth, against him because they were validly married at all times charged, the charges do not involve an assault by him against her and the charges do not involve an assault by him against children of their marriage. The Government argues that Elizabeth Trammel's testimony was properly admitted inasmuch as it was limited to acts as distinguished from *communications* and to statements of Otis Trammel made in the presence of third parties. Thus, the government reasons that the privilege does not arise. Further, the government contends that even if the communications could be considered confidential and privileged, still they would not be protected from disclosure where both spouses participated in the unlawful enterprise.

Trammel relies primarily on Hawkins v. United States, 358 U.S. 74 (1958). That opinion does re-affirm the long-standing common law rule which prohibits one spouse from either voluntarily or under compulsion testifying against the other spouse in a criminal prosecution wherein the other spouse is a defendant, unless the other spouse consents thereto. The Supreme Court stated that "The rule rested mainly on a desire to foster peace in the family and on a general unwillingness to use testimony of witnesses tempted by strong self-interest to testify falsely." 358 U.S. at p. 75. Nothing in *Hawkins* or any other reported decision, to our knowledge, prohibits the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the Government in return for her testimony.

The crux of the common-law rule in the case of a defendant husband, as here, is that the exclusion of the wife's

testimony is required in order to prevent ill feeling against her on the husband's part for her revelation of the truth. Thus, the privilege is that of the defendant spouse preventing the other spouse from testifying against him without his consent. Hawkins v. United States, *supra*; United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975); United States v. Harper, 450 F.2d 1032 (5th Cir. 1971); United States v. Moorman, 358 F.2d 31 (7th Cir. 1966), *cert. denied*, 385 U.S. 866; Peek v. United States, 321 F.2d 934 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964).

Hawkins, *supra*, and other decisions involving the same issue, have stressed that the courts have the right and the responsibility to examine the policies behind the federal common law privileges and to alter, modify or amend them when reason and experience so demand.

In our view, a compelling need to alter or amend the commonlaw rule enunciated in *Hawkins* is dictated by "reason and experience" in the instant case. The witness, Elizabeth Trammel, was a co-conspirator, a participant in the heroin importation scheme and transaction. As such, she was subject to prosecution. The federal immunity statutes, 18 U.S.C. §§6001-6005, represent an accommodation between the right of the Government to compel testimony on the one hand, and the constitutional privilege to remain silent, on the other. United States v. Tramunti, 500 F.2d 1334 (2nd Cir. 1974), *cert. denied*, 419 U.S. 1079 (1974). The purpose of the grant of immunity is to reach the truth, and when that testimony is incriminatory, it cannot be used against the witness. The Congressional intent, then, is that the statutory claim of immunity be as broad as, but no broader than, the privilege against self-incrimination. Childs v. McGord, 420 F. Supp. 428 (D.C. Md. 1976), affirmed, 556 F.2d 1178 (4th Cir. 1977).

A defendant has no standing to contest the propriety of the grant of immunity to a witness. United States v. Rauhoff, 525 F.2d 1170 (7th Cir. 1975). Otis Trammel, as a defendant, thus was without standing to challenge the grant of immunity to his wife, Elizabeth, unless the privilege asserted by reason of the marital relationship is such that the rule of "reason and experience" mandates that the privilege asserted overrides the grant. We hold that it does not.

In our view the allegiance reaffirmed in *Hawkins*, *supra*, to the marital testimonial privilege grounded on the policy of preserving or fostering family peace must give ground to a greater, more compelling public need be-

fore us here. This case, unlike *Hawkins* and other like cases, involves the wife as a participant in the criminal transaction, subject to prosecution therefor. It matters not, in this context, that the witness granted immunity is the spouse of one of the defendants. The common law did not fail to recognize that the rule of privilege between husband and wife was subject to some exceptions, generally premised on the ground of necessity. The necessity was that of avoiding an extreme injustice to the excluded spouse which would ensue upon an undeviating enforcement of the rule. Accordingly, an exception which has been widely recognized in order to protect both the husband and wife arises in cases involving a crime perpetrated by one spouse against the other, termed a "personal wrong." The predicate, of course, is that it is illogical to believe that marital peace can be achieved or promoted by denying a wife who has been beaten, deserted or otherwise badly maltreated the right to testify against her husband about those wrongs. 8 Wigmore on Evidence, McNaughton Revision, Vol. VIII, §2239.

The various judicial utterances on the matter of the exercise of the privilege establish that the privilege belongs to the *party* spouse against whom the other is offered as a witness; however, it is firmly established that the privilege also belongs to the *witness* spouse. *See, generally*, 81 Am. Jur. 2d, Witnesses, Husband and Wife, §§148-171; Wigmore on Evidence, McNaughton Ed., Vol. VIII, Ch. 79, §§2227-2245; United States v. Cameron, 556 F.2d 752 (5th Cir. 1977).

None of the decisions applying the unvarying prohibition rule, i.e., that one spouse may not give testimony against the other without his or her consent, involve the fact situation presented here: Where both the husband and wife have jointly participated in a criminal conspiracy, both are subject to prosecution, and one spouse testifies against the interest of the other under grant of immunity. However, in United States v. Smith, 520 F.2d 1245 (8th Cir. 1975), the court held that in a prosecution of a husband and wife jointly charged with conspiracy, statements made by either inculpatory to the other during the course of and in furtherance of the conspiracy were admissible. *See, also*, 16 Am. Jur. 2d, Conspiracy, §41.

A claim of the Fifth Amendment privilege is a prerequisite to the grant of immunity. Thus, the constitutional privilege cannot be violated before it can be invoked. In the case at bar, then, Elizabeth Trammel did invoke her

Fifth Amendment privilege against self-incrimination. Having done so, she brought herself—as a party to the criminal transaction—within the rule that she who would have the benefit of the privilege must claim it.

This court has held that a defendant husband, in a criminal proceeding, cannot avail himself of the asserted marital privilege preventing the Government from presenting inculpatory testimony of his spouse where the marriage was found to have been entered into fraudulently. United States v. Apodaca, 522 F.2d 568 (10th Cir. 1975). We hold that, to like effect, a defendant husband who has jointly participated in a criminal conspiracy with his wife cannot prevail upon his claim of the marital privilege when his wife gives incriminating testimony under grant of immunity.

We have read and considered United States v. Williams, 447 F.2d 894 (5th Cir. 1971); Ivey v. United States, 344 F.2d 770 (5th Cir. 1965) and Peek v. United States, *supra*. These opinions stand for the bald rule that the testimony of a spouse who is a co-conspirator in the same transactional criminal charges brought against the other spouse cannot testify against the charged spouse in derogation of the husband-wife privilege. These decisions, significantly, do not involve the testimony of a spouse given under grant of immunity. Thus, the "balancing test" function was not brought into play in the above cited opinions.

The applicable rule and reason, in our view, is that applied in United States v. P. Van Drunen, 501 F.2d 1393 (7th Cir. 1974), *cert. denied*, 419 U.S. 1091 (1974). There the defendant's wife was permitted to testify against him relative to matters involving the illegal transportation of an alien which *both* spouses participated in. There was no grant of immunity involved in the case. The court recognized that *Hawkins*, *supra*, was arguably a barrier to the result reached but concluded:

> . . . here, we think that goal (that of preserving the family) does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness.
>
> We do not view *Hawkins* as controlling . . . . The Supreme Court has since announced an exception to *Hawkins* for cases where one spouse commits a crime against another (Wyatt v. United States, 362 U.S.

525, 80 S.Ct. 901, 4 L.Ed.2d 931) and we decline to read the *Hawkins* opinion as foreclosing the possibility of other exceptions not discussed therein.

501 F.2d, at pp. 1396, 1397.

Fed. Rules Evid. Rule 501, 28 U.S.C.A. does not recognize a per se marital privilege rule. It does state the general rule of privilege to be ". . . governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Thus, several courts, including this court, have followed the rule we here apply involving similar husband-wife conspiracy transactions. Baker v. United States, 329 F.2d 786 (10th Cir. 1964), *cert. denied*, 379 U.S. 853 (1964); United States v. Pugliese, 153 F.2d 497 (2nd Cir. 1945).

Immunity statutes have been characterized as essential to the effective enforcement of criminal statutes. Kastigar v. United States, 406 U.S. 441 (1972). Inasmuch as the constitutional guarantees against self-incrimination apply solely for the benefit of a witness in danger of actual conviction (such as Elizabeth Trammel in the instant case), otherwise privileged testimony involving self-incriminating matters may be required.

Exceptions to the common-law rules excluding privileged testimony by one spouse against the other in a criminal prosecution must be made in order to effect the beneficent purposes of the rule. In keeping with the mandates of Rule 501, *supra*, federal courts must determine on a case-to-case basis whether "reason and experience" dictates the alteration or amendment of the marital privilege. In the present case, we believe that there are certain factors which, for all practical purposes, indicate that the testimony of Elizabeth Trammel was not the "death knell" to the existence of the marriage. The parties were extensively engaged in criminal activities shortly following their marriage on May 31, 1975. The record fairly evidences that commencing in August of 1975, Otis Trammel, Jr., (Elizabeth's husband), Edwin Lee Roberts and Joseph Freeman conspired and "masterminded" the scheme to accomplish importation of heroin into the United States from Thailand. Elizabeth Trammel may or may not have freely consented to her participation in the scheme. The record fairly reflects, we believe, that

both Elizabeth Trammel and Janice Keenan were "conduits" or "actors" to accomplish the illicit goals of the scheme. They were being "used." Whether they participated voluntarily or otherwise at all times is a matter for rank conjecture. The record is clear, however, that when their participation in the conspiratorial enterprise was discovered by federal DEA agents who then confronted them, each agreed to cooperate with the federal agents, and they did so. The record evidences that each woman followed instructions from the three charged co-conspirators. Neither planned nor "masterminded" the importation scheme. The same is not true of appellant Otis Trammel, Jr.

It is inconceivable that the Trammels established a "home" with any of the usual, ordinary attributes of "family life." There was no domestic harmony in the commonly accepted nature of a marital relationship to be preserved following commencement of the criminal activities in August of 1975. Beyond this, the nature of the criminal activities pursued all despicable and completely alien to anything conducive to the preservation of a family relationship built around the legal status of marriage. The conduct of the parties shortly following their marriage to the time of appellant Trammel's arrest lent absolutely nothing in building upon, preserving or fostering "family peace" not only "for the benefit of husband, wife and children, but for the benefit of the public as well." Hawkins v. United States, *supra*, at pp. 77, 79.

The facts and circumstances reflected by this record mandate the exception referred to in *Hawkins*, *supra*, and Rule 501, *supra*. The illicit heroin importation activities pursued by the parties would have effectively denied the establishment of "family peace" which could in anywise have been alienated by Elizabeth Trammel's testimony. Thus, reason and experience dictate that the marital privilege rule could not be invoked by appellant Trammel. The law does not force or encourage testimony which would likely alienate husband and wife, or inflame "existing domestic differences." The overriding benefit to be served in this case has been properly served by the action of the trial court: that of bringing to the bar of justice those who have committed grievous criminal acts which most assuredly have been to the breakdown and destruction of many family units and marital relations involving illicit trafficking and use of dangerous drugs and narcotics.

WE AFFIRM.

No. 76-1834—UNITED STATES OF AMERICA, *Plaintiff-Appellee*, *v.* OTIS TRAMMEL, JR., *Defendant-Appellant.*

MCKAY, dissenting:

Mr. and Mrs. Trammel have not only wasted their young lives and exploited the weaknesses of drug addicts for profit, but by their sordid activities they have led us to today's decision to establish a rule for future cases which is unsound and contrary to established precedent. In so doing they have caused us to ignore some time honored presumptions, to forego an opportunity to continue a modest contribution to the withering but vital institution of the family, and to further expand the already excessive role of the doctrine of conspiracy in undermining fundamental rules of law.

If today's opinon affected only Otis Trammel and his wife, I would view it with some concern but not with the degree of apprehension expressed in this dissent. The significance of today's decision is that it establishes a policy for *every* future case in which a prosecutor exercising his essentially unreviewable discretion decides to *accuse* a married couple as coconspirators. While the testimony in this case does not portray the defendant as a person deserving of great sympathy, tomorrow's case may involve a financially troubled couple who appear to be model spouses but are *accused* of conspiracy to file a false tax return. When, under the rule of this case, the wife is offered a chance to avoid a *possible* conviction by testifying against her accused husband, the harm the testimonial privilege seeks to prevent will have been done.

An analysis of the issues presented by this case requires a recognition that there are two distinct privileges based on the marital relationship. The spousal testimony privilege prevents one spouse from giving testimony adverse to the other, either voluntarily or under compulsion, without the other's consent. *Hawkins v. United States*, 358 U.S. 74, 77 (1958). The confidential marital communication privilege bars introduction of any confidential communications between spouses. *United States v. Apodaca*, 522 F.2d 568, 570 (10th Cir. 1975). Only the first privilege is at issue in this case.

In overturning a decision of this circuit, the Supreme Court affirmed in *Hawkins v. United States*, 358 U.S. 74

(1958), that the testimonial privilege is the law in the federal courts. The decision sets forth the parameters of the rule. In *Hawkins* a man was accused of transporting a girl from Arkansas to Oklahoma to work with his wife as a prostitute. As in the case before us, the wife was an alleged participant in criminal activity. Unlike the record in this case, however, the evidence showed that the marriage was already in trouble and the parties were living apart. The court treated the wife's testimony as voluntary, but it reaffirmed the testimonial privilege. Reasoning that the rule is grounded on the sound policy of fostering "family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well," the Court declared that even if the marriage was not an ideal one "the law should not *force or encourage* testimony which might alienate husband and wife, or further inflame existing domestic differences." *Id.* at 77, 79 (emphasis supplied).

This rule has been acknowledged by federal courts in cases where the spouses were alleged coparticipants in crimes. *See, e.g., United States v. Williams*, 447 F.2d 894, 897–98 (5th Cir. 1971); *Ivey v. United States*, 344 F.2d 770, 772–73 (5th Cir. 1965); *Peek v. United State*, 321 F.2d 934, 943 (9th Cir. 1963), *cert. denied*, 376 U.S. 954 (1964).[1] The Tenth Circuit decision relied on by the majority, *Baker v. United States*, 329 F.2d 786 (10th Cir.), *cert. denied*, 379 U.S. 853 (1964), was a case in which the testimonial privilege was not even asserted by the defendant. Indeed, the majority acknowledges the general rule but urges an exception. I respond to the reasons given for this departure from established policy and precedent in the order presented by the majority.

It is urged that *Hawkins* grants a license for this court to "alter, modify or amend [the testimonial privilege] when reason and experience so demand." I am not certain that *Hawkins* provides such an expansive grant. Although I recognize that other circuits have acted to modify the

[1] One case seems clearly contrary, but it involved testimony of events occurring prior to marriage and reflected the impact of Rule 505(c) of the proposed Federal Rules of Evidence, which excepted such testimony from the scope of the privilege. United States v. Van Drunen, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974). Two additional cases contain language suggesting a narrowing of the privilege, but they did not involve calling the other spouse as a witness. United States v. Mackiewicz, 401 F.2d 219 (2d Cir.), *cert. denied*, 393 U.S. 923 (1968); United States v. Pugliese, 153 F.2d 497 (2d Cir. 1945).

privilege, *e.g.*, *United States v. Van Drunen*, 501 F.2d 1393 (7th Cir.), *cert. denied*, 419 U.S. 1091 (1974), I also recognize that the Supreme Court has suggested that changes in the privilege are best left to Congress or to the Court itself.[2] *Hawkins v. United States*, 358 U.S. at 78. At the very least, we should be cautious about eroding the privilege on the impetus of a solitary case. In this regard, we should be guided by the counsel of Mr. Justice Stewart, the lone doubter in *Hawkins*, who observed in concurrence that "[i]t is obvious, however, that all the data necessary for an intelligent formulation 'in the light of reason and experience' could never be provided in a single litigated case." *Id.* at 82 n.4. As an alternative to such a precipitate resolution of the issue, he proposed that a judicial committee be established to gather appropriate information and incorporate it into adequately considered rules. Whatever course proves ultimately wise, I do not think this case presents an adequate factual setting in which to make today's sweeping choice.

The majority insists that the federal immunity statutes, 18 U.S.C. §§ 6001–6005 (1976), provide justification for the proposed exception. These are irrelevant. They address only the Fifth Amendment rights of the declarant. The majority itself acknowledges that Congress intended by the rule a grant no broader than the Fifth Amendment itself. But the testimonial privilege extends beyond the declarant to the accused spouse, and the immunity statutes say nothing about his privilege. The immunity provisions are based on the notion that there is no injustice in compelling a witness to testify in the face of Fifth Amendment proscriptions as long as he will not be subject to prosecution for his testimony. This *quid pro quo* rationale has no application to the situation under consideration here, for no such bargain is struck with respect to the accused spouse. The immunity statutes simply provide no sound justification for fashioning a new exception to the privilege. The majority nonetheless believes that the perceived injustice of excluding immunity-enshrouded testimony is sufficient to justify an erosion of the testimonial privilege. To me this view is inconsistent with the mandate of *Hawkins* and its reluctance

[2] 18 U.S.C. § 3771 (1976) vests in the Supreme Court the power to prescribe rules of pleading, practice, and procedure for criminal cases in federal courts.

to abandon the "persistent instincts of several centuries" that have culminated in the privilege. 358 U.S. at 79.

The majority seems to imply that something inherent in the doctrine of conspiracy itself justifies overturning the privilege. Even assuming the doubtful proposition that conspiracy has such a sweeping scope, applying the doctrine to overcome the testimonial privilege ignores significant procedural ramifications. Under present practice in this circuit, the mere *allegation* of conspiracy would permit the admission of the wife's testimony *before* the truth of the conspiracy allegation is established. In this procedural framework, the destruction of the privilege would not only effectively overturn the presumption of innocence with respect to the conspiracy charge, but it would accomplish the harm forbidden by *Hawkins* before either judge or jury has determined that there was any conspiracy at all.

I confess inability to comprehend what it is in the record of this case that supports the propositions that the Trammels did not have a "home," that they had no "family life" or that there was no "domestic harmony in the commonly accepted nature of a marital relationship." The trial court did not address these questions. Presumably the propositions reflect a view that spouses who commit crimes are incapable of achieving a harmonious marriage. I am not convinced that this view is a sound one, and I discern no support for it in the majority opinion. Even if there were evidence of domestic disharmony virulent enough to destroy family life, this would offer no justification for distinguishing the *Hawkins* precedent. The Supreme Court reached its decision in that case in the face of actual evidence of severe marital discord. 358 U.S. at 82 n.4. It should also be remembered that the Supreme Court was not only loath to alienate husband and wife in a model marriage, but was concerned about inflaming existing differences in a stressful one as well.

I should also say a word about the conflict between the government's interest in obtaining evidentiary support for its accusations and society's interest in perpetuating a privilege intended to promote family unity. All of the arguments about evidentiary needs are equally applicable to the protections of the accused incorporated in the Bill of Rights. While not found in the Bill of Rights, the common law privilege at issue here reflects societal values similar to those expressed in that document. Today's rule articulates an unsound policy to the extent that it gives the prosecutor

discretion to determine which home shall be worth saving and which home shall not have the benefit of the common law privilege. While the majority may be upholding important societal values in reaching the result it does, it seems to me that the principle established in this case strikes at one of the few remaining public supports for the institution of the home. And the home is, after all, a more important contributor to law and order than is prosecution. If the homes fail, no number of prosecutors, judges or jails could stem the tide of ensuing crime. While the Trammel home is perhaps far from an ideal one, the principle established in this case applies to all accused couples and makes us unwitting partisans in the continuing assaults on the stability of the home—the root of true stability in any society.

In the Supreme Court of the United States

No. 78–5705

OTIS TRAMMEL, JR., *Petitioner*

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Tenth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

February 26, 1979

No. 78-5705

Supreme Court, U. S.
FILED
JAN 17 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

OTIS TRAMMEL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-5705

OTIS TRAMMEL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 583 F. 2d 1166.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1978. The petition for a writ of certiorari was filed on November 13, 1978, and is therefore out of time under Rule 22(a) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a wife who participated in a conspiracy to import heroin should have been permitted to testify against her husband and others at their joint trial over the objection of the husband.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner and two others, Joseph Freeman and Edwin Lee Roberts, were convicted of importing heroin in violation

of 21 U.S.C. 952(a) and 18 U.S.C. 2, and conspiring to commit that offense in violation of 21 U.S.C. 962(a) and 963. Petitioner was given an indeterminate sentence pursuant to the Federal Youth Corrections Act, 18 U.S.C. 5010(b). 1/ The court of appeals affirmed, one judge dissenting (Pet. App. 1-10).

1. The evidence at trial showed that petitioner, codefendants Joseph Freeman and Edwin Lee Roberts, petitioner's wife Elizabeth, and Janice Keenan, all neighbors at an Air Force base in Manila, participated in a scheme to obtain heroin from Thailand and transport it via Manila into the United States. In late August 1975, petitioner's wife went to Thailand at petitioner's behest to obtain a quantity of heroin (III Tr. 120) and returned with it to the Philippines, where she gave it to her husband (III Tr. 122-123). Two days later petitioner and his wife flew to Los Angeles with the heroin secreted on the latter's body (III Tr. 124-125). Once there, petitioner's wife returned the heroin to him and subsequently observed him distribute some of it (III Tr. 126).

Petitioner and his wife then joined codefendant Freeman, and the three of them went to San Bernardino to seek a buyer for the remaining heroin (III Tr. 130). Freeman thereafter flew to Virginia, where codefendant Roberts, who had gone there to retrieve a package of heroin he had directed Keenan to mail in the Philippines (III Tr. 21-22), assisted him in disposing of what remained of the drug (GX 2) for $5,000 (GX 3). Freeman then returned to California, where he gave petitioner $3,500 (III Tr. 133-134).

1/ Roberts and Freeman, who were also convicted, were sentenced, respectively, to two years' imprisonment and an indeterminate term under the Youth Corrections Act.

Thereafter petitioner's wife flew to the Philippines with Freeman and a few days later embarked for Thailand, where she obtained another quantity of heroin (III Tr. 135-137). Upon arriving back in the Philippines, she turned the heroin over to Freeman, who later returned it to her for transportation to the United States with instructions to deliver it to Roberts in Colorado Springs (III Tr. 138-140). During a customs search in Hawaii, however, the heroin was discovered on her person and she was arrested. She then agreed to cooperate with the authorities and continue her trip to Colorado (III Tr. 81, 91, 142). There, at the direction of Drug Enforcement Administration agents, she met with Roberts and delivered the heroin. Immediately thereafter DEA agents arrested Roberts (III Tr. 68-145).

2. Prior to trial petitioner moved to sever his trial from that of Roberts and Freeman, or in the alternative, to prevent his wife from testifying against him on the ground that the marital privilege prevents one spouse from giving testimony adverse to the other without his or her consent. The district court denied this motion; at trial petitioner's wife and Janice Keenan, both of whom had been granted immunity from prosecution under the federal immunity statute, 18 U.S.C. 6001-6005, were key government witnesses upon whom the case against petitioner and his codefendants largely depended. The district court did, however, exclude all evidence of confidential communications between petitioner and his wife.

ARGUMENT

The sole issue in this case is whether petitioner could use the marital privilege to prevent his wife, a participant in the illegal drug scheme charged, from testifying to his role in the scheme at his joint trial with two other participants.

In Hawkins v. United States, 358 U.S. 74 (1954), this Court reaffirmed the validity of the evidentiary rule that ordinarily permits a party to exclude the testimony of his spouse. In that case the wife of the defendant testified over his objection in a prosecution for transporting a woman in interstate commerce for purposes of prostitution in violation of the Mann Act, 18 U.S.C. 2421. In concluding that it was error to permit the wife to testify, this Court said (358 U.S. at 77, 79):

> The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well ***.
>
> [T]here is still a widespread belief grounded in present conditions, that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences***.
>
> [H]owever, this decision does not foreclose whatever changes in the rule may eventually be dictated by "reason and experience."

Rule 501 of the Federal Rules of Evidence similarly provides that the privilege of a witness "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."

Accordingly, the privilege against adverse testimony by a spouse is not absolute and, like any rule, is not to be applied mechanically. Rather, it must be construed in accord with its basic purpose--to foster family peace for the benefit of the public as well as the family. Thus, the privilege generally may not be invoked in prosecutions for crimes committed by one spouse against the other. Wyatt v. United States, 362 U.S. 525 (1960). It is also inapplicable in the case of crimes committed by one spouse against the children of either (United States v. Allery, 526 F. 2d 1362 (8th Cir. 1975)) and in actions

by one spouse against an outsider for an intentional injury to the marital relation. United States v. Cameron, 556 F. 2d 752, 756 (5th Cir. 1977)(dictum).

Reason and experience also support an exception when both spouses participate in a criminal conspiracy with others. First, in such circumstances, the public interest in securing the testimony of one of the spouses is greater than it is in the case of a crime committed by a single actor: for "collective criminal agreement" is recognized as in itself a serious danger to the public. Callanan v. United States, 364 U.S. 587, 593-594 (1961). See also Jeffers v. United States, 432 U.S. 137, 157 (1977)(plurality opinion). Second, the spouse of an accused criminal conspirator could testify concerning the conspiracy in the trial of the co-conspirators if the trial were severed from that of the defendant spouse, even though such testimony might publicly reveal the defendant spouse's role in the conspiracy and thereby pose at least some risk of disrupting marital harmony. In re Snoonian, 502 F. 2d 110, 112 (1st Cir. 1974); 8 Wigmore, Evidence § 2234 (1961 McNaughton rev.). Thus the question is not whether to permit a risk to marital harmony by allowing a spouse to reveal the other spouse's role in a conspiracy but rather how great a risk is acceptable. Finally, at least one of the justifications for the privilege is less compelling when spouses are accused of joint participation in criminal activity, for in such circumstances the marriage can hardly be said to function as "an important institution contributing to the rehabilitation of the defendant spouse." United States v. Van Drunen, 501 F. 2d 1393, 1397 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). In sum, the interests served by the privilege generally do "not justify assuring a criminal that he can enlist the aid of his spouse in a criminal

enterprise without fear that by recruiting an accomplice or co-conspirator he is creating another potential witness." United States v. Van Drunen, supra, 501 F. 2d at 1396. Cf. Lutwak v. United States, 344 U.S. 604, 613-615 (1953).

This crime exception accords with exceptions to other privileges where there is participation in crime. Thus it has long been held that a client who uses his attorney to obtain guidance in the commission of a crime is not protected by the attorney-client privilege from the risk that his attorney will be called to testify about their conversations. See Clark v. United States, 289 U.S. 1, 15 (1933); Hyde Construction Co. v. Koehring Co., 455 F. 2d 337, 342 (5th Cir. 1972); United States v. Bob, 106 F. 2d 37, 40 (2d Cir. 1939), cert. denied, 308 U.S. 589 (1939). Indeed, as to the related privilege based on the marital relationship covering confidential communications between spouses, it has been held that the privilege does not apply to marital communications having to do with the commission of a crime and not with the privacy of the marriage. See United States v. Mendoza, 574 F. 2d 1373, 1379-1381 (5th Cir. 1978); United States v. Kahn, 471 F. 2d 191, 194 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973) (cross-petition raising marital privilege issue), reversed on other grounds, 415 U.S. 143 (1974). 2/

2/ Ivey v. United States, 344 F. 2d 770 (5th Cir. 1965) and Peek v. United States, 321 F. 2d 934 (9th Cir. 1963), cert. denied, 376 U.S. 954 (1964), cited in both the majority and dissenting opinions below, do not aid petitioner's cause. In Ivey (344 F. 2d at 772), the court held that "reason and experience" did not warrant the admission of Mrs. Ivey's extra-judicial statement, given the circumstances, among others, that the statement was contradicted by her courtroom testimony and was made while she was under the influence of a narcotic. In Peek, (321 F. 2d at 942-943), the court found no abuse of discretion in the trial court's denial of a pretrial motion for severance that was based on the possibility that the government would use statements in violation of the marital privilege. While the Fifth Circuit did hold in United States v. Williams, 447 F. 2d 894, 897-898 (5th Cir. 1971), also

(Continued on page 7)

In short, this privilege, like others, "takes flight if the relation is abused," Clark v. United States, supra, 289 U.S. at 15, and it is abused where both spouses participate with others in a criminal scheme.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1979

2/ (Continued from page 6)
cited below, that the marital privilege prevented the admission of extra-judicial statements made by Mrs. Williams incriminating her co-conspirator husband, the current validity of that decision is in doubt in view of the Fifth Circuit's recent opinion in United States v. Mendoza, supra. There, in holding that extra-judicial statements of one spouse made in furtherance of a conspiracy are admissible against the other, the court indicated that the privilege is to be narrowly construed by weighing the need for truth against the importance of the policy sought to be furthered by the privilege" and considering "the likelihood that recognizing the privilege in the factual setting of [the] case will in fact further that policy, and, if so, how much." Id. at 1381.

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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-5705

OTIS TRAMMEL, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is officially reported at 583 F.2d 1166. A copy of the opinion appears in the Appendix (A. 39).

JURISDICTION

The judgment of the Court of Appeals affirming the conviction was entered October 11, 1978. The Petition for Writ of Certiorari was docketed on November 13, 1978. Certiorari was granted on February 26, 1979. The jurisdiction of this Court was invoked under

Title 28, United States Code, Section 1254(1) and Rule 19 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V—Capital Crimes: Double Jeopardy: Self-Incrimination: Due Process: Just Compensation For Property

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

65 Stat. 717; Title 18, United States Code, §2. Principals

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

62 Stat. 701; Title 18, United States Code §371. Conspiracy to commit offense or to defraud United States

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

84 Stat. 927; Title 18, United States Code, §6002. Immunity generally

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

84 Stat. 1285; Title 21, United States Code, §952(a).
Importation of controlled substances

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V of title II, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 303 [21 USCS §823],

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

88 Stat. 1926; Rule 501 Federal Rules of Evidence, Article 5. Privileges

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

QUESTION PRESENTED

Whether it is reversible error to permit a wife to be called as a witness against her husband over his objection and without his consent.

STATEMENT OF THE CASE

On March 10, 1976, Otis Trammel, Jr. was indicted in the District of Colorado for importation of heroin in violation of Title 21, United States Code, §952(a) and Title 18, United States Code, §2, and for conspiracy to import heroin in violation of Title 18, United States Code, §371 (A. 4-7). Two other individuals were indicted for the same offenses as Trammel, and six persons were named as "unindicted co-conspirators" including Elizabeth Ann Trammel, the petitioner's wife (A. 4-7). A Motion for Severance was filed on behalf of Trammel on May 21, 1976 (A. 8-9). The primary thrust of the Motion for Severance was to point out to the trial judge that counsel had been informed that Mrs. Trammel would be called to testify at trial, and that the petitioner was unwilling to waive the husband-wife privilege where her testimony was concerned (A. 8).

Four days before the beginning of the trial, Trammel's Motion for Severance was heard and denied (A. 10-33). At the hearing, the government framed the issue to be decided in terms of the "competency" of Mrs. Trammel to testify at the trial, and called her as

a witness assuring the court that witness immunity would be granted to her later (A. 10, 11). Elizabeth Trammel testified at the hearing that she and the petitioner had been married in the Philippines on May 31, 1975, and were still married at the time the hearing was being held on June 17, 1976 (A. 11, 20, 21, 26). At the conclusion of that hearing, the trial judge decided that Mrs. Trammel would be allowed to testify against her husband, but that she would not be permitted to testify to any confidential communications between she and the petitioner (A. 27-30, 32, 33).

The trial of this case began on June 21, 1976, and on that day Mrs. Trammel was called as a witness against all of the defendants (A. 34, 35). Trammel interposed an objection to the fact that his wife was being called as a witness noting that she would be testifying without his consent and renewing all of the arguments that had previously been made (A. 34, 35). Once again, the court ruled that Trammel had no privilege to preclude his wife's testimony and overruled the objection (A. 34, 35).

Elizabeth Trammel testified at length about the importation of heroin from the Philippines and Thailand into the United States. She also testified about the petitioner's participation in some of these acts and in an agreement to take part in the unlawful importation of heroin. Except for the testimony of Elizabeth Trammel, however, there was no other evidence presented against Otis Trammel, Jr. from which

a jury could have convicted him of either of the offenses charged. At the conclusion of all the evidence, the jury returned verdicts of guilty on both counts where Trammel is concerned (A-36).

Trammel appealed his conviction to the United States Court of Appeals for the Tenth Circuit. On appeal, the government did not deny either the existence or the validity of the Trammel marriage; but instead argued for the general proposition that where marriage partners are also co-participants in a crime, then the husband-wife privilege should not be available to shield one spouse from the consequences of the criminal transaction. The Court of Appeals basically decided that where one spouse was a participant in a crime with the other, and where the one spouse was granted witness immunity in exchange for testimony, then the "rule of privilege" would not be applied to exclude the testimony of the immunized spouse (A. 39–46). In the majority opinion, the Court of Appeals also suggested that the reason for the husband-wife privilege was not as strong in this case as it might be in some others because of what was perceived to be the lack of a "family life" and proper "home" in the traditional sense (A. 45).

ARGUMENT I

It Was Error To Permit Elizabeth Trammel To Testify Against Her Husband Over His Objection

When this issue was originally raised with the trial court, that court effectively refused to recognize the "testimonial privilege" or "anti-marital facts privilege". Therefore, the trial court decided that there was only one husband-wife privilege, and that the privilege applied to confidential communications between the parties to the marriage during the course of the marriage (A. 27–29, 32, 33). Applying that ruling, the trial judge permitted the petitioner's wife to testify against him, but held that she could not testify to confidential communications. The United States Court of Appeals for the Tenth Circuit abandoned the trial court's position and recognized the "testimonial privilege", but decided that it should not apply where the spouses are both members of the same conspiracy. The Court of Appeals also distinguished the case at bar from the decisions cited by the petitioner by pointing to the fact that Mrs. Trammel had been granted witness immunity to obtain her testimony. As viewed by the Court of Appeals, that additional factor apparently does away with the husband-wife testimonial privilege and certain legal precedent.

We respectfully submit that both the trial court and the Court of Appeals erred in their respective rulings. In *Hawkins* v. *United States,* 358 U.S. 74 (1958), this Court reaffirmed the validity of the tes-

timonial privilege, and specifically rejected the notion that the privilege should be changed to permit one spouse to voluntarily testify against the other. Notwithstanding their recognition of the rule set out in the *Hawkins* decision, the Court of Appeals decided that:

> "Nothing in Hawkins or any other reported decision, to our knowledge, prohibits the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the Government in return for her testimony." *United States* v. *Trammel*, 583 F.2d 1166, 1168 (10th Cir. 1978).

The grant of witness immunity to Elizabeth Trammel should have no bearing whatever on the husband-wife testimonial privilege. The testimonial privilege relates to both parties and it is only with the consent of both that one may testify. *Wyatt* v. *United States*, 362 U.S. 525, 528 (1960). If it is assumed that witness immunity pursuant to Title 18, U.S.C., §6002 replaces the necessity for consent by the witness-wife as well as replacing her rights under the Fifth Amendment, it certainly cannot effect the need for consent from the other spouse. The Tenth Circuit notes that immunity is ". . . as broad as, but no broader than, the privilege against self-incrimination", but seemingly ignores the fact that the grant of immunity to one spouse is not as broad as the testimonial privilege that was claimed by the other (A. 41). *United States* v. *Doe*, 478 F.2d 194 (1st Cir. 1973), may dispose of

this question where both spouses are granted immunity, but points out that each grant of immunity is limited to the individual witness and no one else.

If the grant of witness immunity is, as we contend, of no real consequence, then the decision of the Court of Appeals in this case is an effort to carve out a new exception to the established principle.[1] The proposed exception centers around the allegation that both marriage partners were involved in an unlawful conspiracy. We do not deny that Rule 501 of the Federal Rules of Evidence, and the opinion in *Hawkins* v. *United States*, *supra*, effectively permit courts to make changes in this privilege where required by "reason and experience", but we deny that either reason or experience supports the exception created in this case. The Court of Appeals recognizes that their decision is directly contrary to certain other circuit court opinions, but prefers to balance the privilege against what the court views as a "more compelling public need".[2] Presumably, the more compelling public need is the need to obtain testimony at any cost, including

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[1] There are three generally recognized exceptions to the principle of testimonial privilege. They include an exception for marriages entered into for fraudulent purposes, *Lutwak* v. *United States*, 344 U.S. 604 (1953); an exception when the crime is committed against one spouse by the other, *Wyatt* v. *United States*, 362 U.S. 525 (1960); and an exception for crimes committed against a child of either spouse by the other, *United States* v. *Allery*, 526 F.2d 1362 (8th Cir. 1975).

[2] *United States* v. *Williams*, 447 F.2d 894 (5th Cir. 1971); *Ivey* v. *United States*, 344 F.2d 770 (5th Cir. 1965) and *Peek* v. *United States*, 321 F.2d 934 (9th Cir. 1963)

the destruction of a family if the prosecutor deems it necessary. This court in *Hawkins* v. *United States, supra,* at p. 78, recognized the probable result of such testimony stating that:

> "Adverse testimony given in criminal proceedings would, we think, be likely to destroy almost any marriage."

In addition, experience teaches that it is frequently a simple matter to accuse someone of participating in a conspiracy. Since the agreement that is the basis of a conspiracy can be implied from evidence presented, and since the necessary knowledge and intent may be inferred, it would be easy in many situations to present probable cause for a grand jury to believe that both marriage partners were involved in a conspiracy. Once that is accomplished, the damage would be done because regardless of the ultimate outcome of the conspiracy charged, one spouse could already have been forced to testify against the other.

In addition, the reason for the decision in *United States* v. *Van Drunen,* 501 F.2d 1393 (7th Cir. 1974), which was embraced by the Court of Appeals in the case at bar is not convincing.[3] The implication of the

[3] "Today's holding, combined with Wyatt, limits the privilege to those cases where it makes most sense, namely, where a spouse who is neither a victim nor a participant observes evidence of the other spouse's crime. In that circumstance, the privilege encourages the preservation of a marriage which may conceivably be an important institution contributing to the rehabilitation of the defendant spouse." *United States* v. *Van Drunen,* 501 F.2d 1393, 1397 (7th Cir. 1974).

language quoted from *Van Drunen* is that the courts should encourage only those marriages that may aid the Government in its efforts toward rehabilitation. Such an attitude is diametrically opposed to the spirit of the privilege and the opinion in the *Hawkins* case. In *Hawkins* v. *United States, supra,* at p.p. 78, 79, the court noted that:

> "The limited nature of these exceptions shows there is still a widespread belief, grounded on present conditions, that the law should not force or encourage testimony which might alienate husband and wife or further inflame existing domestic differences."

Regardless of the language in the *Van Drunen* opinion in favor of a co-conspirator exception to the privilege, the case is distinguishable from the case at bar. The distinguishing feature is the fact that in *Van Drunen* the marriage took place after the indictment had been returned, and the testimony that was the subject of the objection concerned matters prior to the marriage.

To support its position, the Tenth Circuit relied in part on *Baker* v. *United States,* 329 F.2d 786 (10th Cir. 1964) and *United States* v. *Pugliese,* 153 F.2d 497 (2nd Cir. 1945). In each case, both husband and wife were charged as co-defendants, and no spouse in either case was actually called as a witness against the other. As Judge McKay notes in his dissent, the *Baker* case was one in which the testimonial privilege was not even claimed. And *United States* v. *Pugliese, supra,* has little to do with the issue here involved, but

instead deals with the admissibility of out of court declarations made by the wife but used against both parties in a joint trial. A similar line of reasoning has recently been used to admit recorded conversations, between the wife and a Government agent, into evidence against both husband and wife in a joint trial. *United States* v. *Price*, 577 F.2d 1356 (9th Cir. 1978). In the *Price* case as in prior cases, the wife was not called as a witness by the Government, and the evidence was being admitted on the theory that the wife was an agent of the criminal venture and her extrajudicial declarations were made in furtherance of that venture. Those situations are easily distinguished from Trammel's case. Elizabeth Trammel was actually testifying against her husband at trial, and not about prior statements made in furtherance of a conspiracy.

Of the more recently reported cases in this area, Trammel's situation is probably closest to the facts of *United States* v. *Lilley*, 581 F.2d 182 (8th Cir. 1978). Although no conspiracy was charged in that case, the parties were obviously jointly involved in the commission of certain crimes. In the *Lilley* case, the Eighth Circuit confirmed the prosecution's position that the husband was unavailable as a witness because of the "antimarital facts privilege", and found that it was reversible error for the trial judge to then allow the husband to be called as a witness in rebuttal.

Finally, the Court of Appeals in the petitioner's case assumes the lack of a marital relationship stating:

> "There was no domestic harmony in the commonly accepted nature of a marital relationship to be preserved following commencement of the criminal activities in August of 1975." *United States* v. *Trammel, supra*, at p. 1170.

There is no evidence whatsoever in the record to support such a conclusion. Regardless of that, however, the mere fact that the condition of a valid marriage is considered, is a dangerous precedent. If permitted to stand, this case could easily encourage trial courts to look behind admittedly valid marriages to determine what chance, if any, the marriage had for survival. In many cases, the evidentiary hearing necessary to make that determination could itself destroy the marriage simply by opening it up to public scrutiny and examination.

In short, the United States Court of Appeals for the Tenth Circuit, in a break with tradition and precedent, decided that a new exception to the husband-wife testimonial privilege is required by reason and experience.[4] We cannot deny that there is at least

---

[4] "The overriding benefit to be served in this case has been properly served by the action of the trial court: that of bringing to the bar of justice those who have committed grievous criminal acts which most assuredly have led to the breakdown and destruction of many family units and marital relations involving illicit trafficking and use of dangerous drugs and narcotics." *United States* v. *Trammel, supra*, st p. 1171.

some support for the decision of the Court of Appeals but we contend that the greater weight of authority in this area supports the privilege. Additionally, perhaps the greatest difficulty with this proposed new exception would be its administration. Prosecutors would have virtual control over the privilege because of their ability to bring charges and to petition the courts for witness immunity. We submit that the enforcement of criminal laws has not suffered in the past because of the testimonial privilege and it would not suffer in the future. If the position taken by the Tenth Circuit in this case is upheld, the only institution that will suffer is the family. This was more eloquently stated in the dissent in this case by Judge McKay where he said:

> "While the majority may be upholding important societal values in reaching the result it does, it seems to me that the principle established in this case strikes at one of the few remaining public supports for the institution of the home. And the home is, after all, a more important contributor to law and order than is prosecution. If the homes fail, no number of prosecutors, judges or jails could stem the tide of ensuing crime." *United States* v. *Trammel, supra,* at p. 1173.

Therefore, it is the petitioner's position that the long standing policy of the Federal Courts recognizing the husband-wife testimonial privilege should not be sacrificed merely to support one conviction. On balance, the privilege presently protects both the family and the public at large, and further erosion of the privilege

by the exception suggested in this case would in no way be beneficial.

CONCLUSION

For the reasons stated, petitioner respectfully requests this Honorable Court to reverse the judgment of the Court of Appeals and remand the case with instructions to enter a judgment of acquittal on his behalf.

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OCTOBER TERM, 1979

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-5705

OTIS TRAMMEL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 39-50) is reported at 583 F.2d 1166.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1978. The petition for a writ of certiorari was filed on November 13, 1978, and was granted on February 26, 1979 (A. 51). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant may invoke the privilege against adverse spousal testimony to bar the voluntary testimony of his wife when she was a joint participant in the offense charged.

RULE INVOLVED

Rule 501, Fed. R. Evid., provides in pertinent part:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness * * * shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner and two others, Joseph Freeman and Edwin Lee Roberts, were convicted of importing heroin, in violation of 21 U.S.C. 952(a), and conspiring to commit that offense, in violation of 21 U.S.C. 962(a) and 963 (A. 2, 4–7). Petitioner was given an indeterminate sentence pursuant to the Federal Youth Corrections Act, 18 U.S.C. 5010(b) (A. 37).[1] A divided panel of the court of appeals affirmed (A. 39–50).

1. The evidence at trial showed that in 1975 petitioner and his wife Elizabeth lived near co-defendants Freeman and Roberts at Clark Air Force Base in the Philippines (III Tr. 20, 31, 119–120). During

[1] Roberts was sentenced to two years' imprisonment; Freeman received an indeterminate sentence under the Federal Youth Corrections Act.

the time they lived there, the four of them participated with others in a scheme to obtain heroin from Thailand and transport it to the United States by way of the Philippines.

In late August 1975, Elizabeth Trammel flew to Thailand at petitioner's behest to obtain a quantity of heroin. She returned to the Philippines with the heroin and gave it to petitioner. Two days later petitioner and his wife flew to San Francisco, with the heroin secreted on her body, and then proceeded to Los Angeles. There Elizabeth gave the heroin to petitioner and subsequently observed him distribute some of it for further sale (III Tr. 120–127).

On September 13, 1975, co-defendant Freeman flew from the Philippines to California, where he joined petitioner and his wife. The three of them drove to San Bernadino to seek a buyer for the remaining heroin among Freeman's friends. Freeman thereafter went to Virginia to join co-defendant Roberts. Roberts had flown there from the Philippines to retrieve a quantity of heroin that he had arranged to have mailed to him at his parents' address in Portsmouth, Virginia. Roberts assisted Freeman in disposing of petitioner's heroin. Freeman then returned to California, where he gave petitioner $3500. At that time, they discussed plans for petitioner's wife to return to Thailand to obtain an additional supply of heroin (III Tr. 20–22, 127–134).

Elizabeth Trammel flew to the Philippines with Freeman and a few days later embarked for Thailand, where she obtained another quantity of heroin. Upon arriving back in the Philippines, she gave the heroin to Freeman, who returned it to her two days later for transportation to the United States. Freeman instructed her to deliver the heroin to Roberts at Peterson Field Air Force Base in Colorado Springs, and not to give it to petitioner. During a customs search in Hawaii, the heroin was discovered on her person, and she was arrested. She then agreed to cooperate with

Drug Enforcement Administration agents and continued her trip to Colorado (III Tr. 81, 90–91, 135–142).

In Colorado, Elizabeth phoned Roberts at the direction of DEA agents and arranged to meet him at Stapleton Airport (III Tr. 144–145; IV Tr. 60). A surveillance was set up at the airport (IV Tr. 67). When Roberts arrived, he directed Elizabeth to his automobile. Once inside the car, she delivered the heroin to him. She then gave a prearranged signal, and DEA agents arrested Roberts and recovered the heroin (III Tr. 145; IV Tr. 69, 100–101, 114–115).

2. Petitioner was indicted together with Freeman and Roberts on narcotics conspiracy and importation charges. Petitioner's wife was granted use immunity in exchange for her trial testimony and was named in the indictment as an unindicted co-conspirator.[2] Prior to trial petitioner moved to sever his case from that of Roberts and Freeman, asserting that the government planned to call his wife as a witness in the joint trial and that he had not consented to his wife's giving testimony adverse to him (A. 8–9).

At the hearing on his motion to sever, petitioner contended, on the basis of the common-law privilege permitting one spouse to bar the other from giving adverse testimony, that he was entitled to prevent Elizabeth from testifying at his trial (A. 27). The district court denied the motion to sever and ruled that Elizabeth could testify against petitioner. The court ordered, however, that all confidential communications between petitioner and his wife were to be excluded (A. 29).

At trial petitioner unsuccessfully renewed his objection to his wife's being called as a witness (A. 34–35). Elizabeth Trammel was a key government witness, the

[2]She testified that she was advised that if she cooperated with the government she might be charged only with a misdemeanor and receive probation (I Tr. 22). In fact, we are advised, she was not prosecuted for her role in the conspiracy.

case against petitioner resting almost exclusively on her testimony.

The court of appeals upheld the ruling of the district court permitting petitioner's wife to testify over his objection, principally on the ground that the privilege against adverse testimony by a spouse is inapplicable where the spouses jointly participated in the crimes charged.

SUMMARY OF ARGUMENT

1. Under Rule 501 of the Federal Rules of Evidence, all testimonial privileges, except as required by the Constitution, an Act of Congress, or rules prescribed by the Court, are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Testimonial privileges are exceptions to the general rule that the public has a right to every man's evidence, and they impede the search for truth in judicial proceedings. They should, therefore, be construed narrowly, being given no greater scope than is essential to serve the purposes for which they exist.

The present case concerns the public's right to evidence that petitioner's wife agreed to give in the trial of her husband for a criminal offense in which she admitted to having been a joint participant. All confidential communications between petitioner and his wife were excluded from her testimony, but petitioner nonetheless sought to assert a right to bar the testimony on the basis of a common-law privilege barring all adverse testimony by one spouse against the other without the consent of both.

The rationale for this privilege has shifted over the years. In recent years the principal purpose recognized for the privilege has been the preservation of marital harmony. *Hawkins* v. *United States*, 358 U.S. 74, 77 (1958). We submit that this purpose is properly served by a privilege (1) that is held by the witness-spouse

alone, permitting that spouse to decline to give adverse testimony against the other, and (2) that does not bar adverse spousal testimony concerning criminal activity in which the spouses have jointly participated. Under a privilege with either of these limitations, the testimony at issue in this case is admissible.[3]

2. In *Hawkins* v. *United States*, *supra*, this Court rejected the government's argument that the spousal privilege should belong to the witness-spouse alone, but it did not "foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.' " 358 U.S. at 79. We believe that reason and experience dictate overruling *Hawkins* on this issue.

The contours of the marital privilege should be shaped in such a manner as to strike the best balance between the competing societal interests of preserving the harmony of marriages and securing accurate resolution of judicial proceedings. While the goal of marital harmony might properly be given overriding weight when there exists meaningful marital harmony to be preserved and when the giving of adverse spousal testimony is likely to be the occasion for significant disruption of that harmony, the privilege is unjustified in cases where the giving of adverse testimony by the spouse of the accused is not likely to work serious injury to the marriage.

Since it would be impractical as well as unseemly, in our view, for the trial courts to make case-by-case determinations of the "worth" of particular marriages, the Court's task is to establish such general rules for the application of the privilege as are most likely to achieve the best balance between the competing interests. Be-

[3]Seventeen states recognize no privilege on the part of either spouse to withhold testimony in a criminal case, except insofar as the testimony may concern confidential marital communications. See Appendix, *infra*, Table No. 1. We do not here ask the Court to consider total abolition of the common law testimonial privilege, since it is unnecessary to go that far in order to sustain the judgment of the court of appeals.

cause the accused will almost always, as a matter of pure self-interest, seek to bar adverse spousal testimony regardless of any effect such testimony might have on marital harmony, the rule of *Hawkins* is almost entirely ineffectual as a means for striking a balance, operating instead to override the societal interest in just trial outcomes in every case. On the other hand, when one spouse is willing to give testimony adverse to the other in a criminal case, although having the right to withhold such testimony, that will often be a strong indication that the testimony is not likely to so injure the marriage as to justify its exclusion. For that reason, we urge the Court to locate the power to withhold adverse testimony in the witness-spouse rather than in the accused.

In many cases, indeed, permitting the accused to block adverse testimony that his or her spouse is willing to give might, in itself, be a cause of dissension in the marriage. Equally important, in cases like the present one, in which the spouse who agrees to testify is an admitted joint participant in the offense charged, vesting the privilege in the accused could work a serious injustice. By giving such testimony, a spouse might be able to secure more lenient treatment by the prosecutor in his or her own case. It is unfair to permit the other spouse—particularly where that spouse is the more culpable—to deprive the witness-spouse of this option and thereby subject him or her to greater criminal liability than he or she would otherwise suffer, while the defendant-spouse escapes punishment by suppressing the other's testimony.

In the present case, petitioner's wife chose to cooperate with the prosecution, including giving testimony against petitioner, thereby avoiding indictment for her role in the conspiracy charged. There is little basis in reason, experience, or the record in this case to suggest that marital harmony might have been materially advanced had petitioner been able to deny her that choice. On the other hand, conferring the privilege upon him

would almost surely enable petitioner to escape conviction despite his guilt, since the evidence of his participation in the conspiracy to import heroin derives almost entirely from the testimony of his wife.

3. Even were the Court otherwise inclined to leave the rule of *Hawkins* intact, it should not sustain the privilege claimed by petitioner in the circumstances of this case. The policy of preserving marital harmony and thereby advancing society's interest in protecting the institution of marriage is seriously undercut when the spouses have been joint participants in crime. A privilege that recognizes no exception for such cases permits one spouse to induce the other to give aid to a criminal enterprise, free of the fear that this assistant could later give adverse testimony. Society's interest in protecting the harmony of marriages is not advanced in any desirable way by providing an incentive for recruiting one's spouse into criminal activity. Such a privilege permits an abuse of the very relationship the privilege is designed to protect.

This argument accords with the treatment of other privileges—such as the lawyer-client privilege—for which exceptions are made where the protected relationship is used for criminal purposes. See, *e.g.*, *Clark* v. *United States*, 289 U.S. 1, 15 (1933). Reason and experience dictate that the privilege against adverse spousal testimony should not operate to bar the testimony of a spouse concerning criminal activity in which it is reliably determined that the spouses have been joint participants.

ARGUMENT

A DEFENDANT SHOULD NOT BE PERMITTED TO PREVENT HIS OR HER SPOUSE FROM GIVING ADVERSE TESTIMONY IF THE SPOUSE IS WILLING TO TESTIFY OR IF THE SPOUSES ARE JOINT PARTICIPANTS IN THE OFFENSE CHARGED

A. INTRODUCTION

1. *This Court is free to modify common-law privileges in the light of reason and experience*

Under Rule 501 of the Federal Rules of Evidence, all testimonial privileges, except as required by the Constitution, an Act of Congress, or rules prescribed by this Court, are "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The language of Rule 501 is taken from former Rule 26, Fed. R. Crim. P., which previously governed the admissibility of evidence in federal courts, including the application of the common-law privileges.[4] In enacting Rule 501, Congress expressed its intent that the courts continue to carry out their traditional responsibility for development of the law of testimonial privileges through the adjudication of particular cases.[5]

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[4] The language of Fed. R. Crim. P. 26 (1971 ed.) was, in turn, taken from the decision in *Wolfle* v. *United States*, 291 U.S. 7, 12 (1934), in which this Court stated:

> [T]he rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.

[5] Congress rejected the treatment of privileges in Article V as drafted by the Advisory Committee on Rules of Evidence. Fed. R. Evid. 501 replaces the Committee's set of 13 rules defining nine specific non-constitutional privileges and excluding all other privileges except those designated by federal statute. See Proposed Fed. R. Evid. 501-513, 56 F.R.D. 183, 230-261 (1973); S. Rep. No. 93-1277, 93d Cong., 2d Sess. 11-13 (1974); H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 8-9 (1973). The proposed rules included a "Husband-Wife Privilege," which, with certain exceptions, would have empowered an "accused in a criminal proceeding * * * to prevent his spouse from testifying against him." Proposed Fed. R. Evid. 505, 56 F.R.D. at 244-245.

Thus, as Congressman Hungate, the principal sponsor of the Rules of Evidence in the House, explained during floor debate:

> Rule 501 is not intended to freeze the law of privilege as it now exists. The phrase "governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience," is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis.

120 Cong. Rec. 40891 (1974).[6]

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[6]The amicus Michigan Bar Association Standing Committee on Civil Procedure contends (Br. 20–25) that this Court should not exercise its power to modify common-law privileges through its decisions because Congress has, in 28 U.S.C. 2076, restricted this Court's exercise of its *rulemaking* power respecting privileges by providing that any amendment to the Federal Rules of Evidence proposed by the Court "creating, abolishing, or modifying a privilege" shall not be effective unless "approved by act of Congress." This contention is insubstantial. It makes Section 2076, which was adopted contemporaneously with the Federal Rules of Evidence, flatly inconsistent with the grant by Rule 501 of the power to the federal courts to continue the common-law evolution of the federal law of privileges "in the light of reason and experience," and it overlooks the clear indication in the legislative history of Rule 501 that Congress fully expected the federal courts, in federal question cases and criminal proceedings, to continue to oversee the development of the common law respecting privileges in the adversarial context of particular adjudications. S. Rep. No. 93-1277, 93d Cong., 2d Sess. 11 (1974); H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 8 (1973); 120 Cong. Rec. 40891 (1974) (remarks of Rep. Hungate). Because Congress has the power to amend Rule 501 whenever it wishes—and thereby to overrule any change in common-law privileges made in court decisions with which it disagrees—there is no merit to the further contention of amicus (Br. 22–23) that if this Court declines to forgo use of its traditional power to shape the common law in the matter of privileges, it will thereby "cheat" Congress out of its "say" in the matter.

2. Testimonial privileges should be narrowly construed

One common-law principle affecting the treatment of privileges is the maxim—repeatedly reaffirmed by this Court—that the public has a right to every man's evidence. See, *e.g.*, *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972); *United States* v. *Bryan*, 339 U.S. 323, 331 (1950); 8 J. Wigmore, *Evidence* §2192 (McNaughton rev. 1961). Exceptions to this general principle are tolerable, as Mr. Justice Frankfurter observed, "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." *Elkins* v. *United States*, 364 U.S. 206, 234 (1960) (dissenting opinion). See also *United States* v. *Bryan*, *supra*, 339 U.S. at 331.

Where such exceptions are recognized, this Court has indicated that they should not be "expansively construed, for they are in derogation of the search for truth." *United States* v. *Nixon*, 418 U.S. 683, 710 (1974). See also *Herbert* v. *Lando*, No. 77-1105 (April 18, 1979), slip op. 20–21; *Fisher* v. *United States*, 425 U.S. 391, 403 (1976). Accordingly, general rules of exclusion are not automatically applied in all circumstances; rather, courts inquire whether application of the rule will promote its objectives sufficiently to justify the substantial cost to society of excluding probative evidence. This Court, for example, has substituted for automatic exclusion of evidence seized in violation of Fourth Amendment rights a balancing test in which deterrence of official misconduct and the degree of disruption of proceedings are weighed. See, *e.g.*, *United States* v. *Janis*, 428 U.S. 433 (1976); *Stone* v. *Powell*, 428 U.S. 465, 488 (1976); *United States* v. *Calandra*, 414 U.S. 338, 349–352 (1974); *Walder* v. *United States*, 347 U.S. 62 (1954).

The present case concerns the public's right to evidence that a wife has agreed to give in the trial of her

husband for a criminal offense in which she admits to having been a joint participant. Because the witness had been granted immunity against the use of her testimony in a criminal proceeding against her and because the trial judge had directed that testimony concerning confidential communications between her husband and herself be excluded, the only basis for excluding her evidence was the objection of petitioner, resting on a common-law privilege to bar all adverse testimony by his spouse.

As we show below, this privilege is an ancient one but one that has undergone changes over the years, all of them in the form of exceptions to, or narrowings of the privilege, to assure that the search for truth is impeded only where some other public good plainly demands it. As we also show, reason and experience suggest that the policy ostensibly served by the privilege claimed by petitioner in this case would be better served by a privilege (1) that is held by the witness-spouse alone, permitting that spouse to decline to give adverse testimony against the other, and (2) that does not bar adverse spousal testimony concerning criminal activity in which the spouses have jointly participated. Under a privilege with either of these limitations, the testimony at issue in this case is admissible.

3. *The policy underlying the modern privilege is the protection of marital harmony*

The privilege against adverse spousal testimony was born of a generally held repugnance to condemning a man by the testimony of one "who lived under his roof, shared the secrets of his domestic life, depended on him for sustenance and [was] almost numbered among his chattels." 8 Wigmore, *supra*, §2227, at 212.[7] At a time

[7]This privilege—sometimes referred to as the "anti-marital facts" privilege (8 Wigmore, *supra*, §2227, at 210)—is distinct from the privilege, developed somewhat later, for confidential communications between a husband and wife. *Id.*, §§2333–2334, at 644–647. See also *Blau* v. *United States*, 340 U.S. 332 (1951). The communications privilege does not bar all testimony by one spouse against another, but, unlike the privilege against adverse spousal testimony, it applies even in proceedings that take place after the spouses have divorced (so long as the communications at issue occurred during the marriage), and it applies even if the testimony is not adverse. 8 Wigmore, *supra*, §2334, at 646.

when the offense of petit treason by a wife—violence against the head of a household— was still recognized, it would have seemed inconsistent for the law to allow a "testimonial betrayal" that came close to petit treason and virtually permitted a wife to cause her husband's death. *Ibid.*

By the time of Lord Coke, the privilege was perceived as an incident of the disqualification of all spousal testimony. *Ibid.* The disqualification was based on the common-law rule of incompetency that excluded the testimony of interested parties to a lawsuit, both barring testimony by a party in his own behalf, and conferring on him a privilege not to be a witness against his own cause. This rule, reinforced by the common-law belief that husband and wife were legally one person, resulted in the general disqualification of spouses from testifying for or against one another.[8]

Always the subject of widespread criticism, the rule of disqualification was gradually overturned. The disqualification of the party was abandoned in the course of the 19th century, and the disqualification of favorable spousal testimony was subsequently discarded as well. *Funk* v. *United States*, 290 U.S. 371 (1933). The rule prohibiting adverse testimony by a spouse survived, however, even after the concepts upon which it was historically based had been rejected. See *Hawkins* v. *United States*, 358 U.S. 74, 81 (1958) (Stewart, J., con-

[8]Blackstone wrote that admitting husband and wife as witnesses against each other would contradict the maxim "nemo tenetur seipsum accusare"—"no one should be held to accuse himself." 1 W. Blackstone, *Commentaries* *443.

curring), although, as we show below (pages 23–25, *infra*), it has, in the majority of states, either been substantially modified or abolished in favor of a privilege protecting only confidential communications between spouses.

The predominant modern-day justification for the privilege, whatever its form, is that it preserves marital harmony.[9] This was, thus, the ground on which this Court, in *Hawkins* v. *United States*, *supra*, upheld the application of the privilege in a criminal proceeding. In *Hawkins*, the defendant's wife testified over his objection in a prosecution under the Mann Act, 18 U.S.C. 2421. The Court identified as the basis for the privilege against adverse spousal testimony the "belief that such a policy [is] necessary to foster family peace, not only for the benefit of husband, wife and children, but for

[9] Critics of the privilege argue, however, that the stability of the family does not depend upon the inability of spouses to testify against one another and that the goal of preserving the family therefore provides an inadequate basis for excluding potentially valuable evidence. They also point out the inconsistency of providing the privilege to spouses while denying it to parents, children, and siblings, since the peace of the family is no less dependent on the harmoniousness of those relationships. Finally—and this appears to be Wigmore's principal objection—they maintain that it is unjust and illogical to permit the wrongdoer to prevent his victim from obtaining redress in the name of preserving his own marital peace. 8 Wigmore, *supra*, §2228, at 216–217. See also, 5 J. Bentham, *Rationale of Judicial Evidence* 332, 339–345 (1827); Note, *The Husband-Wife Privileges of Testimonial Non-Disclosure*, 56 Nw. U. L. Rev. 208, 230 (1961); Hines, *Privileged Testimony of Husband and Wife in California*, 19 Calif. L. Rev. 390, 408 (1931); Hutchins & Slesinger, *Some Observations on the Law of Evidence: Family Relations*, 13 Minn. L. Rev. 675 (1929); 1 E. Livingston, *The Complete Works of Edward Livingston on Criminal Jurisprudence* 450–459 (1968 Reprint); C. McCormick, *Evidence* §66, at 145–146 (2d ed. 1972) (footnote omitted) ("The privilege is an archaic survival of a mystical religious dogma and of a way of thinking about the marital relation that is today outmoded.").

the benefit of the public as well." 358 U.S. at 77. It concluded: "Such a belief has never been unreasonable and is not now." *Ibid.* See also *Wyatt* v. *United States*, 362 U.S. 525, 527 (1960); *Lutwak* v. *United States*, 344 U.S. 604, 615 (1953); *Stein* v. *Bowman*, 38 U.S. (13 Pet.) 209, 221 (1839). Although the privilege has been justified on other grounds,[10] the courts have not generally adopted them. By now it is clear that the privilege is to be construed in accordance with its purpose of protecting the family as a socially beneficial institution.

Thus, in *Lutwak* v. *United States*, *supra*, 344 U.S. at 615, this Court held that the privilege should not be applied where it would prevent the "wives" of sham marriages, entered into for the purpose of evading the immigration laws, from testifying against their "husbands," since society's interest in protecting "the sanc-

[10] It has been advanced as justification for the privilege that there exists a "natural repugnance" to compelling a wife or husband to be the means of the other's condemnation, and to exposing the culprit to the humiliation of being condemned by his spouse. See *Wyatt* v. *United States*, *supra*, 362 U.S. at 535 (dissenting opinion); 8 Wigmore, *supra*, §2228, at 217. A throwback to the days when the offense of petit treason was still recognized, this basis for the privilege is, as Wigmore asserts, "not more than a sentiment" and "does not posit any direct and practical consequence of evil"; the same argument could be made for "abolishing the office of spies in a war" (*ibid.*).

Amicus suggests (Am. Br. 35–36) that the privilege might have First Amendment underpinnings as an exercise of the right of marital privacy recognized in *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). The privacy right recognized in *Griswold*, however, concerned the right to be free of governmental intrusion when making decisions on intimate matters—such as contraception—that affect the marital relationship. While a connection may be discerned between that right and a privilege against compelled testimony respecting communications between spouses on certain subjects, no such connection is apparent between that privacy right and a general privilege permitting an accused to bar testimony by his or her spouse respecting criminal conduct, such as participation in a conspiracy to import heroin.

tity and tranquility of the marital relationship" is not advanced by protecting relationships entered into by those who had no intent of establishing a true marital relationship. For different reasons, we submit that the policy of protecting the marital relationship is not sufficiently served by barring the testimony given by petitioner's wife in this case to justify the costs incurred.

B. A Proper Accommodation Of The Competing Interests of Marital Harmony And Accurate Trial Outcomes Is Best Achieved By Vesting The Privilege To Withhold Testimony In The Witness-Spouse

As the result in *Lutwak* suggests, the marital privilege is not an absolute one that must be given sway regardless of competing societal considerations. Indeed, even at common law the privilege against adverse testimony by a spouse was not absolute. An exception was very early recognized in prosecutions for crimes committed by one spouse against the other, on grounds that strict application of the rule would allow a husband to injure his wife in secrecy with complete impunity.[11]

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[11] See *Trial of Lord Audley*, 3 How. St. Tr. 401, 414 (1631), admitting such testimony "where the wife is the party grieved, and on whom the crime is committed." This Court recognized the exception in *Stein* v. *Bowman*, *supra*, 38 U.S. at 221; and in *Wyatt* v. *United States*, *supra*, it held that in a prosecution under the Mann Act, 18 U.S.C. 2421, in which the defendant's wife was the victim of the offense, she could even be compelled over her objection to testify against her husband. The exception for injuries to the spouse is commonly placed on the ground of necessity, that is, the unavailability of any other witness. Wigmore has argued that this notion of necessity "might commendably have been a broader one; the necessity of doing justice to other persons in general, when the spouse's testimony was indispensable, would have been at least as great." 8 Wigmore, *supra*, §2239, at 242.

This exception for "crimes against the other" was, in time, broadly interpreted to include crimes against children of the marriage,[12] crimes against a spouse's property,[13] adultery,[14] bigamy,[15] incest,[16] and abandonment.[17] Many of these exceptions have been codified in state statutes. Moreover, as we explain below (pages 23-25, *infra*), a majority of the states and the District of Columbia have modified the privilege in such a way as to make adverse spousal testimony other than that involving confidential communications admissible in criminal trials over the objection of the defendant-spouse.

In recent years, federal courts have expressly acknowledged the need to balance competing considerations in determining whether the privilege should be applied in a particular case. *United States* v. *Cameron*, 556 F.2d 752, 756 (5th Cir. 1977); *Ryan* v. *Commissioner*, 568 F.2d 531, 543 (7th Cir. 1977); *United States* v. *Allery*, 526 F.2d 1362, 1366-1367 (8th Cir. 1975). In discussing the related privilege protecting confidential communications between spouses, the Fifth Circuit, for example, has indicated that in deciding how—or whether—to apply the privilege, it will weigh "the

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[12] *United States* v. *Allery*, 526 F.2d 1362 (8th Cir. 1975); *Balltrip* v. *People*, 157 Colo. 108, 114, 401 P.2d 259, 263 (1965).

[13] *Herman* v. *United States*, 220 F.2d 219, 226 (4th Cir. 1955), cert. denied, 350 U.S. 971 (1956); *United States* v. *Graham*, 87 F.Supp. 237 (E.D. Mich. 1949); *In re Kellogg*, 41 Cal. App. 2d 833, 107 P.2d 964 (1940).

[14] *United States* v. *Ryno*, 130 F. Supp. 685 (S.D. Cal. 1955), aff'd on other grounds, 232 F.2d 581 (9th Cir. 1956); *State* v. *Bennett*, 31 Iowa 24 (1870).

[15] *Richardson* v. *State*, 103 Md. 112, 63 A. 317 (1906); *Hills* v. *State*, 61 Neb. 589, 85 N.W. 836 (1901).

[16] *State* v. *Shultz*, 177 Iowa 321, 158 N.W. 539 (1916).

[17] *United States* v. *Ryno*, *supra*; *State* v. *Bean*, 104 Mo. App. 255, 78 S.W. 640 (1904).

need for truth against the importance of the policy sought to be furthered by the privilege," considering "the likelihood that recognizing the privilege in the factual setting of [the] case will in fact further that policy, and, if so, [by] how much." *United States* v. *Mendoza*, 574 F.2d 1373, 1381 (5th Cir. 1978). Thus, the courts recognize that where the need for the evidence outweighs the likelihood that the policy of a privilege will be advanced, the privilege ought to give way.

The object of the marital privilege is to preserve marital harmony. It is indispensable to the accomplishment of this goal that there be some marital harmony to preserve; the societal cost of withholding probative evidence from the jury is simply not worth paying unless the spouse's testimony would create a significant peril to the marriage that is otherwise avoidable.

Of course, the probable effect of adverse spousal testimony on a particular marriage, as well as the damage its exclusion would do to the fact-finding process in a particular case, will vary substantially from case to case. We do not suggest, however, that the availability of the privilege should depend on a case by case judicial assessment of the "worth" of a particular marriage—an undertaking that would be not only difficult but unseemly. Rather, the Court should seek to fashion criteria of general application that will strike the best balance in the majority of cases between the competing social interests that are at stake.

The rule for which petitioner contends—vesting a power to exclude the testimony in the defendant-spouse—is in our view unduly costly to the goal of just trial outcomes and has no tendency to differentiate between instances in which there exists a meaningful degree of marital harmony to be preserved and those in which there does not. Under that rule, even if there is already an irreparable estrangement between the spouses, the defendant will almost always move to bar adverse spousal testimony as a matter of pure self-interest.

The better rule would vest the power to withhold adverse testimony in the witness-spouse. As a general proposition, the willingness or unwillingness of one spouse to testify against the other is a meaningful barometer of the degree to which marital harmony exists and merits protection despite the significant social costs that loss of the testimony would entail. When a spouse, having the right to withhold testimony, is nevertheless willing to testify, suppression of that testimony is not likely to advance significantly the policy underlying the privilege. See C. McCormick, *Evidence* §66, at 145 (2d ed. 1972); Comment, *Federal Rules of Evidence and the Law of Privileges*, 15 Wayne L. Rev. 1287, 1336 (1969).[18]

We recognize that this argument was rejected by this Court in *Hawkins* v. *United States*, *supra*, but we believe it is a question appropriate for reconsideration. This Court took care to observe in *Hawkins* that its decision did not "foreclose whatever changes in the rule may eventually be dictated by 'reason and experience.' " 358 U.S. at 79.

When the spouse of a defendant charged with a criminal offense knows of facts suggesting that the defendant has in fact committed the offense, he or she may well wish not to testify against the defendant-spouse, whether out of feelings of loyalty to the spouse

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[18] Also, as one commentator has pointed out, the "repugnancy" rationale for the privilege (see page 12, *supra*) is at least weaker in cases in which a defendant seeks to bar the voluntary testimony of his or her spouse: "If 'repugnancy' is the rationale, it applies primarily to the spectre of compelling a spouse to condemn his or her mate on pain of contempt; however, if the witness spouse chooses voluntarily to testify, whether out of a sense of duty to tell the truth or out of ill feeling toward the accused, society will less likely be offended." Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 Calif. L. Rev. 1353, 1384–1385 (1973) (footnote omitted).

or a desire not to risk endangering the marital relationship. On the other hand, the non-defendant spouse may have no affection for the defendant-spouse, may believe there is no marital relationship worth saving, or may think that the best course for the defendant-spouse, and for the marriage in the long run, is for the truth to come out and the defendant-spouse to accept the consequences of his or her conduct. At least as between the defendant-spouse and the witness-spouse, the latter is the better judge of these questions. For as one commentator has observed:

> If the rationale for the privilege is one of avoiding marital dissension, then the only spouse able to make a decision to testify on the basis of whether the marriage is worth saving is the *witness* spouse; the accused is understandably unlikely to be able to put aside his or her strong personal interest in suppressing adverse testimony, and would be likely to invoke the privilege regardless of marital considerations.

Reutlinger, *Policy, Privacy, and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 Calif. L. Rev. 1353, 1384 (1973) (emphasis in original).

Permitting one spouse to prevent the other from testifying might even, in some cases, prove at least as great a source of dissension in the marriage as permitting the witness-spouse to testify over the defendant's objection. Moreover, in cases such as the present one, in which both spouses are involved in the criminal conduct to some degree, permitting the defendant-spouse to invoke the privilege could work a grave injustice.

When, for example, a wife is in danger of losing her freedom if she refuses to cooperate with the prosecution, while her husband is free to suppress any testimony she might give against him, the price for indulging such a power in the husband is paid by both the wife and the judicial process. This is an especially undesirable result where her husband is responsible for

having brought her to this unfortunate pass in the first place, and where her willingness to become a government witness may signify a desire to forgo the criminal life. Yet, though an accused may avoid punishment simply by invoking the privilege, his spouse is powerless without his cooperation to achieve the same result by refusing to invoke it and assisting the government.[19] Indeed, the tables are completely turned; instead of the witness-spouse having the option of earning her freedom by aiding in the conviction of her husband, the accused is in a position to subject her to punishment, while avoiding it himself. Since the accused is ordinarily the more culpable, it is an intolerable consequence of the privilege that he should go free while his spouse is punished. Such a result would hardly be conducive to the maintenence of marital harmony. Yet that is a result to which the privilege claimed by petitioner can lead.[20]

It has been suggested that adverse spousal testimony by one who is himself subject to prosecution cannot be regarded as truly voluntary because of the leverage possessed by the government in its exercise of prosecutorial discretion, and that the spouse's willingness to

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[19] It is unrealistic to expect the government to award consideration for the mere willingness to testify. Such a policy would quickly degenerate into a charade in which the witness-spouse would agree to testify knowing the accused would invoke the privilege.

[20] A related situation arises where the spouses are co-defendants and the wife wishes to exculpate herself by placing the blame on her husband. The privilege would presumably permit the husband to prevent her from testifying. This problem could be resolved by severing the defendants pursuant to Rule 14, Fed. R. Crim. P. (see Comment, *Marital Privileges and the Right to Testify*, 34 U. Chi. L. Rev. 196 (1966)); a severance, however, would deny a single jury the opportunity to apportion blame and would create a situation in which each spouse could conceivably escape punishment by shifting responsibility to the other.

testify cannot, therefore, be taken as an indication of his or her feelings toward the defendant-spouse. *Hawkins* v. *United States, supra*, 358 U.S. at 83 (Stewart, J., concurring); 2 *Weinstein's Evidence* ¶505[04], at 505–15 (1979).[21] This overstates the case, however, since the decision to testify is still voluntary, although it is presumably a result of weighing the interest in securing lenient treatment in return for testimony against any concern that may be felt about the possibility of damaging the marriage by giving testimony that could lead to the conviction of the defendant-spouse. But in any event, in these circumstances, as we have pointed out, denying the witness-spouse this option is manifestly unfair and may "inflame existing domestic differences" (*Hawkins* v. *United States, supra*, 358 U.S. at 79) just as easily as may permitting the witness-spouse to testify.[22]

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[21] This was the principal reason given in a memorandum by Edward W. Cleary, Reporter for the Advisory Committee on the Federal Rules of Evidence, for rejecting the suggestion by the Department of Justice that the witness-spouse be the sole holder of the privilege. *Rules of Evidence: Hearings on Proposed Rules of Evidence Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 57–58 (1973). (Making the witness-spouse sole holder of the privilege was advocated by Senator McClellan as well as by the Department. *Id.* at 51.) As noted below (pages 24–25, *infra*), the recognition of a privilege in a defendant in a criminal proceeding to prevent his spouse from giving testimony against him, incorporated in Proposed Fed. R. Evid. 505 (56 F.R.D. at 244–245), reflects neither a majority rule among the states nor the rule adopted by the drafters of the Uniform Rules of Evidence.

[22] While it is clear in this case that Elizabeth Trammel was offered favorable treatment with regard to her own offense in exchange for cooperation in the prosecution of petitioner and his co-defendants, this appears to have been wholly independent of any motivation to overcome the marital privilege. The record does not suggest that she would have been treated any differently had she instead been the girl friend or a blood relative of

In sum, in deciding whether to adhere to the holding of *Hawkins* that the right to bar adverse spousal testimony rests with the defendant-spouse rather than the witness-spouse, the Court should consider several factors: (1) the greatly diminished likelihood when the witness-spouse has agreed to give adverse testimony that the policy of the privilege will be materially advanced, (2) the damage to the judicial process of exclusion of the testimony, and (3) the injustice to the witness-spouse of vesting in the defendant the power to destroy the witness-spouse's ability to reach a favorable arrangement with prosecutors in his or her own case.

At least two of these considerations support our position that the privilege should not apply in the instant case.[23] Elizabeth Trammel willingly testified against her husband, and that testimony was indispensable to the case against petitioner. Had it been excluded, it is doubtful that petitioner could have been brought to justice for his serious crimes. Because her testimony was a quid pro quo for lenient treatment of her own offense, the ironic result of a reversal in this case would be that future Elizabeth Trammels would be prevented by their husbands' power to invoke the marital privilege from

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petitioner, or simply his partner in crime. Indeed, as the record indicates, Janice Keenan, a government witness who was also an admitted participant in the conspiracy, received a similar grant of immunity in exchange for her testimony, even though she was only a "roommate" of one of the defendants (III Tr. 12–15, 18–20). We are advised that Janice Keenan, like petitioner, has not been prosecuted for her role in the conspiracy.

[23] It is unclear from the record what degree of marital harmony, if any, might have been put at risk by Elizabeth Trammel's testimony. Whether or not her agreement to testify in exchange for lenient treatment suggests that she judged the marriage either not worth saving or not likely to be endangered by her testimony, petitioner's invocation of the privilege certainly sheds no light whatsoever on the likely effect of his wife's testimony on the marriage.

protecting their own interests in avoiding severe punishment.

Recent trends in state law reflect a diminished willingness to allow a defendant in a criminal case to bar the adverse testimony of his or her spouse. In his concurrence in *Hawkins*, Mr. Justice Stewart noted that "[a]pparently some nineteen States have either abolished or substantially modified this privilege." 358 U.S. at 81 n.3. This figure was evidently based upon a 1952 article reviewing state law at that time.[24] Within a few years after *Hawkins*, this figure had risen to 22 states and the District of Columbia. See Note, *Spousal Testimony*, 28 Brooklyn L. Rev. 259, 293-295 (1962). Our survey of current state laws (see Appendix, *infra*) shows that 27 states and the District of Columbia now refuse to confer upon the defendant-spouse a power to bar adverse spousal testimony in a criminal case.[25] Not only does this figure represent a majority of the jurisidictions comprising the states and the District of Columbia; it also includes a substantial number of the highly populous states (*e.g.*, California, New York, Illinois, Ohio). The states that would not recognize petitioner's claim of privilege in fact contain more than 60% of the Nation's population (and presumably a similar proportion of its litigation).[26] In short, if the Court elects to perpetuate the *Hawkins* rule, it will be aligning the federal system with a declining minority position. For the reasons of policy that we have outlined above, it should decline to do so.

[24] Note, *Competency of One Spouse to Testify Against the Other in Criminal Cases Where the Testimony Does Not Relate to Confidential Communications: Modern Trend*, 38 Va. L. Rev. 359 (1952).

[25] In its note to Proposed Fed. R. Evid. 505, the Advisory Committee observed that "[a]bout 30 jurisdictions recognize a privilege of an accused in a criminal case to prevent his or her spouse from testifying." 56 F.R.D. at 245. As the figures supplied above indicate, there are now no more than 24 such states (and in seven of those the bar to testimony is not, strictly speaking, a privilege in the defendant-spouse but a rule of incompetency that bars adverse testimony by one spouse against the other without respect to the wishes of either) (see Appendix, *infra*, Table Nos. 3, 4). It is noteworthy also that the Uniform Rules of Evidence, published in 1974, provide in Rule 501 that only those privileges created by constitution, statute, or rule shall be recognized; and in Rule 504 they replace the common-law spousal privilege with a privilege limited to protecting confidential communications between spouses.

C. The Policy of the Privilege is Not Served by Applying It Where the Spouses Are Joint Participants in the Offense Charged

Even if this Court declines to hold that the privilege against adverse spousal testimony does not apply where the witness-spouse is willing to testify, the testimony of petitioner's wife should be held admissible for the reason that the evidence indicated that she and the petitioner were joint participants in the conspiracy to import heroin charged in the indictment. In such circumstances, society's interest in preserving marital harmony is outweighed by the injury inflicted on the public by the use of the marital relationship for illicit purposes. As the Seventh Circuit observed, in reasoning adopted by the court of appeals in this case (A. 43):

> [The] goal [of preserving the family] does not justify assuring a criminal that he can enlist the aid of his spouse in a criminal enterprise without fear that by recruiting an accomplice or coconspirator he is creating another potential witness.

[26] The states rejecting such a privilege are identified in our survey (Appendix, *infra*, Table Nos. 1, 2). The population percentage approximation given above is based on Bureau of Census estimates of the population of the United States in 1976, broken down by states. Bureau of the Census, *Statistical Abstract of the United States* 11 (98th annual ed. 1977).

United States v. *Van Drunen*, 501 F.2d 1393, 1396 (7th Cir.), cert. denied, 419 U.S. 1091 (1974). See also *Ryan* v. *Commissioner*, *supra*, 568 F.2d at 544. Plainly, society's interest in fostering harmony in marriages, which ordinarily may be thought to contribute to the rehabilitation of the defendant-spouse, is not well served by providing an incentive for recruiting one's spouse into criminal activity.[27] A privilege permitting co-conspirator spouses each to prevent testimony by the other concerning their joint criminal activity would tend to encourage abuse of the relationship that the privilege is designed to protect. Cf. *Wyatt* v. *United States*, *supra*, 362 U.S. at 527.

This analysis accords with exceptions to other privileges, where the privileged relationship is similarly abused. Thus, it has long been held that a client who uses his attorney to obtain guidance in the commission of a crime is not protected by the attorney-client privilege against his attorney's taking the stand to testify about their conversations. *Clark* v. *United States*, 289 U.S. 1, 15 (1933); *In re Doe*, 551 F.2d 899 (2d Cir. 1977); *Hyde Construction Co.* v. *Koehring Co.*, 455 F.2d 337, 342 (5th Cir. 1972); *United States* v. *Friedman*, 445 F.2d 1076, 1086 (9th Cir.), cert. denied, 404 U.S. 958 (1971). It has also been held that the privilege protecting confidential communications between husband and wife does not apply to communications in furtherance of criminal activity. See *United States* v. *Mendoza*, *supra*, 574 F.2d at 1379–1381; *United States* v. *Kahn*, 471 F.2d 191, 194 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973); *State* v. *Smith*, 384 A.2d 687, 693–694 (Me. 1978); *People* v. *Watkins*, 89 Misc. 2d 870, 393 N.Y.S.2d 283 (Sup. Ct. 1977); *Gill* v. *Commonwealth*, 374 S.W.2d 848, 851 (Ky. 1964); but see

[27] As Jeremy Bentham observed, the privilege would not only make "every man's house his castle," but it would aid in converting it into "a den of thieves." 5 *Rationale of Judicial Evidence* 340 (1827).

Smith v. *State*, 344 So.2d 915, 919 (Fla. Dist. Ct. App. 1977). The privilege against adverse testimony by a spouse, like other privileges, should "take[] flight if the relation is abused" (*Clark* v. *United States*, *supra*, 289 U.S. at 15), and the marital relation is clearly abused where the spouses jointly participate in crime.

An additional reason for recognizing this exception to the privilege against adverse spousal testimony is that it would prevent the injustice, discussed above (pages 20–21, *supra*), of permitting one spouse to escape conviction by suppressing the testimony of the other, while depriving the latter of the opportunity to seek more lenient treatment in exchange for full testimony concerning the joint criminal activity. The result of withdrawing the privilege in the case of criminal conspiracies in which spouses are joint participants would thus be to place spouses who wished to cooperate fully with the government on an equal footing with other members of the conspiracy in regard to the type of cooperation they could offer in return for favorable treatment of their own cases.

Allowance of an exception to the privilege in these circumstances would not resuscitate any argument that was rejected by this Court in *Hawkins*. Regardless whether, as amicus argues (Am. Br. 8–9), the wife who testified in *Hawkins* could have been regarded as occupying a position functionally equivalent to that of an unindicted co-conspirator like Elizabeth Trammel, the fact remains that the government raised no issue as to a co-conspirator exception in *Hawkins*, and the Court, accordingly, did not consider such an argument.[28] In

[28] For the same reason, petitioner is incorrect in suggesting (Br. 11 n.2, 14) that decisions of the Fifth, Eighth, and Ninth Circuits have rejected the co-conspirator exception. The issue was not raised in *United States* v. *Lilley*, 581 F.2d 182 (8th Cir. 1978); *Ivey* v. *United States*, 344 F.2d 770 (5th Cir. 1965); or *Peek* v. *United States*, 321 F.2d 934 (9th Cir. 1963). In *United States* v. *Williams*, 447 F.2d 894, 898 (5th Cir. 1971), the Fifth Circuit expressly declined to decide whether there is a co-

any event, as already noted, the Court made it clear that the decision in *Hawkins* did not foreclose modifications of the privilege recognized there.

Amicus contends (Am. Br. 12–16) that establishment of a co-conspirator exception to the privilege would lead to prosecutorial abuse in the form of naming spouses as co-conspirators on the basis of inadequate evidence. We do not suggest, however, that a bare allegation of conspiracy would be an adequate basis for recognizing such an exception; nor, on the other hand, would a formal allegation of conspiracy against both spouses even be necessary if a prosecutor could make an adequate offer of proof to the trial judge regarding the spouses' participation in joint criminal activity.[29] In any event, there was clearly no prosecutorial abuse in the present case. Petitioner's wife testified without objection in the pretrial hearing on petitioner's severance motion, and

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conspirator exception to the privilege against adverse spousal testimony.

[29] Arguments of amicus (Am. Br. 9–14) reveal, moreover, that this objection to the recognition of a co-conspirator exception to the privilege in fact applies to a number of evidentiary rules unique to conspiracy cases. Yet the courts have found ways of preventing unsupported conspiracy allegations from serving as a basis for admitting evidence that would be inadmissible absent such allegations. With regard to the admission of co-conspirator hearsay evidence, the courts have devised somewhat varying standards for the quantum of proof of the existence of a conspiracy and a particular defendant's participation in it that is required before such hearsay evidence will be admitted against that defendant. See, *e.g.*, *United States* v. *James*, 590 F.2d 575, 581 & n.4 (5th Cir. 1979) (en banc), cert. denied, Nos. 78–1412, 78–6369 & 78–6431 (June 4, 1979); *United States* v. *Santiago*, 582 F.2d 1128, 1133–1135 (7th Cir. 1978). See also cases holding that a prima facie showing establishing the criminal nature of an attorney-client communication must be made in order to defeat the attorney-client privilege. *Clark* v. *United States*, *supra*, 289 U.S. at 15; *United States* v. *Friedman*, *supra*, 445 F.2d at 1086; *United States* v. *Bob*, 106 F.2d 37, 40 (2d Cir.), cert. denied, 308 U.S. 589 (1939).

her testimony clearly established the substantial basis for her classification as a co-conspirator.

As explained above, Elizabeth Trammel's testimony was essential to the truth-seeking process in petitioner's trial. Petitioner sought to block that testimony by invoking a privilege designed to protect a relationship that the testimony would show he had exploited for criminal purposes. "Reason and experience" dictate that the privilege should be unavailable to a defendant-spouse in such a case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

SURVEY OF THE LAW IN THE FIFTY STATES AND THE DISTRICT OF COLUMBIA RESPECTING THE PRIVILEGE AGAINST ADVERSE SPOUSAL TESTIMONY IN CRIMINAL PROCEEDINGS

Table 1: Jurisdictions in Which the Privilege Has Been Abolished

State	*Source Defining the Existing Rule*
Arkansas	ARK. STAT. ANN. §28-1001, Rules 501 and 504 (Cum. Supp. 1977)[1]
Delaware	DEL. CODE ANN. tit. 11, §3502 (1975)
Florida	FLA. STAT. ANN. §§90.501, 90.504 (West Supp. 1979)
Illinois	ILL. ANN. STAT. ch. 38, §155-1 (Smith-Hurd Cum. Supp. 1979)
Indiana	IND. CODE ANN. §§34-1-14-4, 34-1-14-5 (Burns 1973)
Kansas	KAN. STAT. ANN. §§60-407, 60-428 (1976)

[1] Rule 501 provides that no privileges other than those provided by constitution or statute will be recognized; Rule 504 specifies the "Husband-Wife Privilege," which is limited to protection of confidential communications. Many jurisdictions have a communications privilege, but we have cited such provisions only where they represent the only privilege recognized with respect to spousal testimony; this, together with a general competency rule, indicates that the state does not recognize the different, broader privilege at issue in this case (see pages 12-13, note 7, *supra*).

The Arkansas rule, like virtually all of those listed in these tables, specifies certain exceptions (*e.g.*, the communications privilege does not apply in cases in which a spouse is charged with a crime against the person or property of the other spouse (Rule 504(d)). We have not classified the statutes according to such exceptions because that information is not material to the purpose of these tables.

State	*Source Defining the Existing Rule*
Maine	ME. REV. STAT. ANN., Maine Rules of Evidence, Rules 501, 504 (West Supp. 1978)
New Hampshire	N.H. REV. STAT. ANN. §516:27 (1974)
New York	N.Y. CRIM. PROC. LAW §60.10 (McKinney 1971); N.Y. CIV. PRAC. LAW §§4502, 4512 (McKinney 1963)
North Dakota	N.D. CENT. CODE, N.D. Rules of Evidence, Rules 501, 504 (Supp. 1977)
Ohio	OHIO REV. CODE ANN. §§2317.01, 2317.02 (Page 1954)
Oklahoma	OKLA. STAT. ANN. tit 12, §§2103, 2501, 2504 (West Cum. Supp. 1978–1979)
South Carolina	S.C. CODE §19–11–30 (1977)
South Dakota	S.D. COMPILED LAWS ANN. §§19–13–1, 19–13–12 through 19–13–15 (Supp. 1978)
Tennessee	TENN. CODE ANN. §40–2404 (1975)
Vermont	VT. STAT. ANN. tit. 12, §1605 (1973)
Wisconsin	WIS. STAT. ANN. §§905.01, 905.05 (West 1975)

Table 2: Jurisdictions in Which the Privilege Is Vested Solely in the Witness-Spouse

State	*Source Defining the Existing Rule*
Alabama	ALA. CODE tit. 12, §21–227 (1977)
Arizona	ARIZ. REV. STAT. ANN. §12–2231 (Supp. 1978)
California	CAL. EVID. CODE §§970–973 (West 1966)
Connecticut	CONN. GEN. STAT. ANN. §54–84 (West Cum. Supp. 1979)
District of Columbia	D.C. CODE §14–306 (1973)
Georgia	GA. CODE ANN. §38–1604 (1974)
Kentucky	KY. REV. STAT. §421.210 (Cum. Supp. 1978)
Louisiana	LA. REV. STAT. ANN. §15:461 (West 1967)
Maryland	MD. CTS. & JUD. PROC. CODE ANN. §§9–101, 9–106 (1974)
Massachusetts	MASS. ANN. LAWS ch. 233, §20 (Law. Co-op 1974)
Rhode Island	R.I. GEN. LAWS §12–17–10 (1970); see *State* v. *Kenyon*, 18 R.I. 217, 26 A. 199 (1893)

Table 3: Jurisdictions in Which the Privilege is Vested in Both Spouses or in the Defendant-Spouse Alone

State	*Source Defining the Existing Rule*
Alaska	ALASKA CRIM. PROC. RULES 26(b)(2) (Supp. Sept. 1968)
Colorado	COLO. REV. STAT. §13-90-107 (1974)
Idaho	IDAHO CODE §9-203 (Cum. Supp. 1978)
Michigan	MICH. COMP. LAWS §600.2162 (MICH. STAT. ANN. §27A.2162 (Callaghan 1976))
Minnesota	MINN. STAT. ANN. §595.02 (West Cum. Supp. 1978)
Missouri	MO. ANN. STAT. §546.260 (Vernon 1953)
Montana	MONT. REV. CODES ANN. §95-3011 (Cum. Supp. 1975)
Nebraska	NEB. REV. STAT. §27-505 (1975)
Nevada	NEV. REV. STAT. §49.295 (1977)
New Jersey	N.J. STAT. ANN. §2A:84A-17 (West 1976)
New Mexico	N.M. STAT. ANN. §20-4-505 (Cum. Supp. 1975)
Oregon	OR. REV. STAT. §44.040 (1977)
Utah	UTAH CODE ANN. §78-24-8 (1977)
Virginia	VA. CODE §19.2-271.2 (Cum. Supp. 1978)

State	*Source Defining the Existing Rule*
Washington	WASH. REV. CODE ANN. §5.60.060 (Supp. 1979)
West Virginia	W. VA. CODE §57-3-3 (1966)

Table 4: Jurisdictions in Which a Spouse is Not Competent To Testify Against the Other in a Criminal Proceeding

State	*Source Defining the Existing Rule*
Hawaii	HAW. REV. STAT. §621-18 (1968)
Iowa	IOWA CODE §622.7 (1979)
Mississippi	MISS. CODE ANN. §13-1-5 (Cum. Supp. 1978)
North Carolina	N.C. GEN. STAT. §8-57 (Cum. Supp. 1977)
Pennsylvania	PA. STAT. ANN. tit. 42, §§5913, 5915 (Purdon Supp. 1979)
Texas	TEX. CRIM. PRO. CODE ANN. art. 38.11 (Vernon 1979)
Wyoming	WYO. STAT. §1-12-104 (1977)

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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The Michigan Bar Association Standing Committee on Civil Procedure respectfully moves for leave to file the attached brief *Amicus Curiae* in this case. The consent of the attorneys for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the Michigan Bar Civil Procedure Committee in this case arises in the natural course of its work. The Michigan Bar Association does not have a Committee on Evidence, and questions of Evidence and Privilege are dealt with by several committees. Questions of Evidence and Privilege being a part of the general field of Procedure are very often referred to this

Committee by the Bar Association or the State Supreme Court, for study, debate, comment, suggested improvement, and recommendations. The Committee has existed continuously as a functioning organ of the Michigan Bar Association for many years. Twenty members from all corners of our large state meet at the State Bar Association headquarters at Lansing regularly and there deliberate and approve, amend, or reject the detailed work of members on the extensive calendar of business. Members who may accumulate more than a few unexcused absences are removed and replaced. The rate of attendance is very high, and the work strenuous and detailed. The membership includes several judges, and several law professors, the balance being active lawyers from every size community and type of practice.

Since the rules of evidence and privilege generally apply in civil, criminal, and quasi-criminal cases with few distinctions, the committee deals in the evidence and privilege areas with whole rules and problems rather than attempting an artificial limitation of our work to civil aspects only, since that limitation is not present in the body of the law of evidence generally.

The opinion of the 10th Circuit Court of Appeals in this case came to the attention of the Committee from the standard reporter in the course of routine research. It raised immediate, grave concern with members because of the destruction of the major part of the existing Federal law of Husband/Wife privilege, and further, because of the fact that if the reasoning of the opinion below were to be accepted as the law of the land, it would be equally valid to emasculate the other major privileges of clergyman-parishioner, attorney-client, and physician-patient.

The Committee then discussed the problem at a meeting and voted without dissent to authorize the undersigned to prepare and attempt to file an *Amicus Curiae* brief in this court. The authority of the Committee to submit this brief as an action of the Committee has been cleared by the Committee Chairman with the President of the Michigan Bar and the staff of the Bar Association.

The concern of our Committee and Bar are not speculative, academic, illusory, or diletantist. The evidentiary privileges are bred in the bone of the working lawyer's daily practice. The decision in this case, by this Court, will instantly set the rule for every Federal trial in our state. More than that, where this Court leads, in the modern era, in the field of evidence, state courts and state codes of evidence increasingly follow. The pressure and impetus to this, and to have naturally uniform rules of evidence has been gaining momentum every since the Federal Rules of Evidence were adopted in 1975. Already over a quarter of the states have adopted these same rules. See *Weinstein's Evidence*, Vol. 1, supplement at T-1 and further supplements thereto. Michigan is now among these states. *Weinstein, supra;* M. R. E. 101 *et seq.* (1978). Michigan provides in its state courts a strong and careful spousal privilege by a well tried statute, M. S. A. 600.2162 (1963), but the security of this and other privileges would be cast in doubt by the opinion below if upheld here. The opinion below says that the marital privilege seen in *Hawkins* v. *United States*, 358 U. S. 74 (1958), still exists but that it can be penetrated for myriad reasons under the new Federal Rule of Evidence 501. Michigan has adopted a close version of 501, and if a privilege anchored in the unanimous prior recent opinion of the United States Supreme Court in *Hawkins* v. *United States, supra,* is not proof against the unsuspected power of rule 501 interpretation, we can scarcely feel more secure about our privilege anchored in a statute of the same period, for it was the clear expressed intent in adopting our new rules of evidence to pattern upon and follow the new Federal Rules and authority. *See* J. Robinson and J. Reed, A REVIEW OF THE PROPOSED MICHIGAN RULES OF EVIDENCE, 56 Mich. St. Bar Journal 21 at 23, 28 (1977). The reflected effect of this Court's decision under the new rules is strongly felt even in those states where adoption is not immediately expected. See 1, *Weinstein's Evidence* at T-2.

While excellent briefs were filed by the parties in the Court below, and are expected here, the opinion below seems unaware of important aspects of the question presented. Among these are the legislative history of the Federal Rules of Evidence concerning privilege, the difficult Constitutional implications of their holding, and an important recent Federal Statute having a bearing on the case. 89 Stat. 806, 28 U. S. C. A. § 2076 (Supp. 1979). It seemed important these be called to the Court's attention and their bearing on the decision analyzed. They could well be dispositive of the case. This is done in the attached brief. Surely this is proper work for an *Amicus Curiae*. We ask only to be permitted to cast what light we can upon the full issues presented by this case.

Wherefore, movant asks leave as aforesaid.

Respectfully submitted,

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BRIEF FOR THE AMICUS CURIAE MICHIGAN BAR ASSOCIATION STANDING COMMITTEE ON CIVIL PROCEDURE.

OPINION BELOW.

The opinion of the Court of Appeals is reported at 583 F. 2d 1166. There was no reported opinion at the District Court level.

JURISDICTION.

Jurisdiction of this Court was invoked by Petitioner under 28 U. S. C. § 1254(1) and Rule 19 of Rules of the Supreme Court of the United States and on February 26, 1979, this Court granted certiorari.

QUESTION PRESENTED.

The Petition for Writ of Certiorari presented the question:

"Is it reversible error to permit a wife to testify against her husband over his objection and without his consent?"

STATEMENT.

The Petitioner was convicted of unlawfully importing heroin and conspiracy to unlawfully import heroin. The government's case against Petitioner was based on the testimony of his wife. The government granted use immunity to the wife in the usual manner. The petitioner made timely, repeated, adequate objection to the use of his wife as a witness against him, and her testimony, as a violation of marital privilege. On appeal the 10th Circuit held in the opinion below that *Hawkins* v. *United States*, 358 U. S. 74 (1958) was not controlling and that the Petitioner was not entitled to the marital testimonial privilege. Petitioner sought certiorari in this Court, which was granted.

SUMMARY OF ARGUMENT.

I. The Opinion below holds that the privilege of a defendant on trial for crime not to have his spouse pitted against him as a government witness, unanimously reaffirmed by this Court in *Hawkins* v. *United States*, 358 U. S. 74 (1958), cannot be claimed by the defendant in this case for six reasons. The asserted reasons are:

A. The witness wife was an "unindicted co-conspirator" here, and not in *Hawkins*. This distinction is without substance because:

1. The record and opinions in *Hawkins* are silent on this point;
2. The label or status had no significance in *Hawkins;*
3. The status of unindicted co-conspirator is amorphous and insignificant in the law for any purpose relevant here;
4. This distinction would combine temptation, opportunity, and unreviewable discretion over defendant's evidentiary rights in the prosecutor to an unpermissable degree.

B. The next reason advanced in the opinion below for thrusting aside *Hawkins* as not controlling is that the witness wife was "subject to prosecution" in this case. This distinction is insupportable because:

1. Such a fact has never been considered a reason for denying a defendant's privilege, and
2. The facts show the claimed difference in *Hawkins* and this case does not exist.

C. The third reason advanced in the opinion below to cast away the *Hawkins* rule was that the new Federal

Rules of Evidence authorize and permit the departure. This reason is invalid, because:

1. The "light of reason and experience" support *Hawkins;*
2. The legislative history of the Federal Rules of Evidence show the clear intent to preserve the privilege;
3. An important recent statute of Congress displays the intent to protect existing privilege.

D. The opinion below states that the defendant husband lost his privilege in this case because the witness wife was given immunity. This reason is irrelevant, because:

1. Past cases do not support this new theory, but are inconsistent with it;
2. Neither Congress or this Court ever intended such a collateral effect for the immunity statute, which is concerned with the Vth Amendment rights of the witness and not the rights of others; and
3. The rationale unwisely imperils other existing privileges.

E. Next, the opinion below finds the privilege not applicable here because they say the marriage of the witness and the defendant was worthless. This reason to depart from *Hawkins* will not do, because:

1. The purported distinctions are illusory, standardless, and confusing;
2. The past cases strongly reject such unwise judicial enquiry on quality of marriage;
3. There was not even a factual enquiry on this point in this case.

F. The final reason the opinion below gives for breaking through the *Hawkins* privilege is that the end justifies

the means, that is, the defendant is bad and thus is entitled to fewer rights than good persons. This is not sound law, but a dangerous breach of uniform standards.

II. The Constitutional Implications of upholding the reasoning of the opinion below would be pervasive and severe. While these implications are not considered, explored or developed in the opinion below, they are real and important. The opinion below impairs a deep natural right of privacy rooted in the Ist, IVth, Vth, and IXth Amendments. Though these rights were overlooked in this case, they will rise to be litigated in many cases and aspects if the reasoning of the opinion below becomes the law of the land.

III. Conclusion. For all the above reasons the *Hawkins* anti-spouse pitting privilege should be re-affirmed and held fully applicable to the facts here.

ARGUMENT.[1]

I.

THE OPINION BELOW HOLDS THAT THE PRIVILEGE OF A DEFENDANT ON TRIAL FOR CRIME NOT TO HAVE HIS SPOUSE PITTED AGAINST HIM AS A GOVERNMENT WITNESS, CANNOT BE CLAIMED BY THE DEFENDANT IN THIS CASE FOR SIX REASONS. THESE REASONS ARE SEVERALLY ERRONEOUS.

Your *Amicus* respectfully suggests that the opinion of the Court of Appeals in this case is in error. The argument of that opinion is that while *Hawkins* v. *United States,* 358 U. S. 74 (1958) is the law, it was proper not to follow *Hawkins* in the present case for a composite of six reasons. These reasons are:

1. The wife was an unindicted co-conspirator here. 583 F. 2d 1166, 1168.
2. The wife was subject to prosecution here. 583 F. 2d 1166, 1168.
3. The Federal Rules of Evidence permit and sanction this departure. 583 F.2d 1166, 1170.
4. The wife was given immunity in this case. 583 F. 2d 1166, 1168-1170.
5. The marriage here was worthless. 583 F. 2d 1166, 1170-1171.
6. The end justifies the means. 583 F. 2d 1166, 1171.

Each of these caimed distinctions or reasons for departing from *Hawkins* in this case is severally erroneous. The attempt to

1. Your Amicus and its Attorney of Record wish to gratefully acknowledge in this brief the substantial and valuable assistance of Robert L. Love, Jr. of Seattle, Washington, Kathleen H. Moriarty of New York, New York, and Eugene J. Brady of Sturgis, Michigan, law students at the University of Notre Dame Law School, in the preparation of this brief.

weave six errors into a new rule of law destroying an ancient and important rule of law is remarkable from many points of view and undesirable from even more. The singular nature of the process of legal reasoning applied is a good measure of the desperate violence of what is here attempted. One may be sure that sounder and more normal modes of legal argument would have been employed if they would have supported the result desired to be achieved by the majority opinion below, namely, the extinguishment of the more ancient and vital of the two forms of marital privilege, and the practical overruling of *Hawkins.*

This *Amicus* brief will discuss each of the six claimed reasons why *Hawkins* was supposed somehow to be different from the present case, and show that these claimed distinctions are all either inaccurate, inadequate, irrelevant, or highly destructive to the rule of law. Some of the claimed reasons present more than one of these fatal blemishes.

A. The Witness Wife Was an "Unindicted Co-conspirator" Here, and Not in Hawkins. This Distinction Is Without Substance Because:

1. The Record and Opinions in Hawkins Are Silent on This Point.

The first reason advanced for deciding this case by the opposite of the basic rule reaffirmed in *Hawkins* is that here, the wife was an unindicted co-conspirator, which she was not in *Hawkins.* In the first place, so far as the published opinions in *Hawkins* go, this is merely a brash assumption from a silent record in a case where neither the Court of Appeals, who denied the privilege, or this Court, who upheld the ancient privilege and reversed the Court of Appeals, discussed this point. Plainly neither court considered it of the slightest significance to the question presented. Now, from the silence of those opinions, is to be conjured a "fact", and that imagined fact made so im-

portant as to take prominent place among reasons to distinguish away the last opinion of this Court, which was unanimous in support of the privilege.

The opinion below falls into error here by failing to recall that a witness may be an unindicted co-conspirator for every purpose known to this time to the rules of evidence without being labelled such in the indictment. Indeed, this is the commonest way in which such witnesses appear in the cases. *See* for example, *United States* v. *Pugliese,* 153 F. 2d 497, 500 (C. A. 2, 1945), L. Hand, J., G. Lilly, *An Introduction to the Law of Evidence,* 205 (1978); McCormick, *Evidence,* § 267 at p. 646 (1972); and Federal Rules of Evidence, Rule 801(d)(2)(E), especially comment of Advisory Committee and Senate Judiciary Committee on the Rule. All of these authorities agree that the indictment does not even have to *charge* conspiracy, let alone label the witness, in order for the status to be achieved and the rule applied. If the government is serious in contending this labelling has an important effect on the evidentiary rights of defendant, then they should in logical fairness refuse to apply the co-conspirator exception to the hearsay rule unless the out of court declarant has been named an unindicted co-conspirator in the indictment. It is safe to assume the prosecution will not adopt that view, nor does your *amicus* urge it.

2. The Label or Status Had No Significance in Hawkins.

The position, then, is this. Either the wife in *Hawkins was* an unindicted co-conspirator or she *was not*. We cannot tell from the opinions, for they are silent. If she *was,* then the supposed distinction does not exist. If she was not, then neither Court in *Hawkins* found that significant enough to even mention, which is a strange way to handle what is now claimed to be a vital difference. In *Hawkins,* the Court of Appeals simply relied on their own earlier opinion in *Yoder* v. *United States,* 80 F. 2d 665 (C. A. 10, 1935). *Yoder* in its turn did not involve a co-conspirator wife, and in no way suggests that this would be

important. In fact, if it had been deemed important in *Yoder,* the court could not have reached the decision it did, for Mrs. Yoder was but an innocent, uninvolved bystander.

In *Hawkins,* the Court of Appeals had said:

> ". . . But in *Yoder* v. *United States,* 10 Cir., 80 F. 2d 665, this court committed itself to the view that a wife is a competent witness to give testimony against her husband *on the trial of a criminal case in which he is charged with a crime.* . . . the court expressly placed its decision upon the underlying ground that a wife is a competent witness for the government in a criminal case *in which her husband is being tried for a criminal offense;* and we are content to follow that case without any effort to amplify or elucidate its undergirding philospohy." *Hawkins* v. *United States,* 249 F. 2d 735, 736 (C. A. 10, 1957) (emphasis added).

It is disingenuous to argue now that if Mrs. Hawkins had been labelled an "unindicted co-conspirator" (as she easily could have been so classified[2]) *that* would have made an important difference. The Court of Appeals in *Hawkins* made no such distinction and instead grounded their position on their own earlier, unreviewable opinion in *Yoder,* a case in which the wife was an innocent outsider not guilty or claimed to be guilty of *any* crime or conspiracy. Further, there was not even a charge of conspiracy in *Yoder! See Yoder* v. *United States,* 80 F. 2d 665, 667 (C. A. 10, 1935); *see also* the same case at earlier trial, *Yoder* v. *United States,* 71 F. 2d 85 (C. A. 10, 1934).

3. The Status of Unindicted Co-conspirator Is Amorphous and Insignificant in the Law for Any Purpose Relevant Here.

It is also appropriate to examine the designation or label "unindicted co-conspirator" to see what kind of horse is being asked to bear the weight or part of the weight of an exception

2. *See* the facts of *Hawkins* in 249 F. 2d 735, 737, and note, she had been imprisoned as a material witness and put under a bond of $3,000 to appear for the government. *See* 358 U. S. 74, 82-83.

sufficient to destroy *Hawkins* and the ancient privilege. Now, if this were a status which was so important it could destroy the personal legal rights of others, we would expect it to have been clearly defined by statute, rule, or court decision.

Instead, no federal statute, regulation, or rule defines it. As to Judicial definition, Words and Phrases covering from 1658 to date, did not even contain this category until the current pocket part, which contains two cases. One was the special, limited, delicate case of Mr. Nixon, where this Court declined to review and disturb the Grand Jury's designation of Mr. Nixon as an unindicted co-conspirator, noting the familiar rule that declarations of a co-conspirator in furtherance of the conspiracy are an exception to hearsay rule. This Court did not, even in those careful circumstances, think it necessary to define what an unindicted co-conspirator is. The other case is a federal court decision holding that the designation is so piffling that it need not be disclosed even under the rigorous requirements of the S. E. C. *See* 43 *Words and Phrases* "Unindicted Co-conspirator" (Supp. 1978 at p. 35), citing *United States* v. *Nixon,* 418 U. S. 683, 687, 700, 701 (1974) and *Lyman* v. *Standard Brands Inc.,* 364 F. Supp. 794, 798 (E. D. Pa. 1973).

The *Lyman* case, *supra,* is the one prior judicial decision that does concern itself with the meaning and status of "unindicted co-conspirator." That case held that the role of unindicted co-conspirator is not even important enought for its omission to be material under the scrupulously exact rules of the S. E. C. as to proxy statements for publicly traded companies. The court then said:

> "The naming of Andersen as an unindicted co-conspirator is of no significance for the purpose of § 14(a). Whatever the outcome of the Four Seasons litigation, the government has no obligation to prove anything against Andersen and there will be no determination of Andersen's guilt or innocence since it is not charged with committing any unlawful acts. The naming of a party as an unindicted co-conspirator is often more a means of taking advantage of the rules of evidence in conspiracy prosecutions than it is an intimation of guilt. See Note, "Developments in the Law: Criminal Conspiracy," 72 Harv. L. Rev. 920, 983-88 (1959). To inform the shareholders of Andersen's role in the Four Seasons indictments would convey no information relevant to their vote on the proposal before them (that Andersen be made auditor of their company) and would probably serve only to confuse." *Lyman* v. *Standard Brands Inc.,* 364 F. Supp. 794, 798 (E. D. Pa. 1973) (explanatory insert in parenthesis added).

The whole category of co-conspirator has been significant in law only for three purposes. First, you cannot have a conspiracy without co-conspirators, for no one, not even a schizophrene, can conspire with himself alone. 15A C. J. S. *Conspiracy,* § 37 at p. 730 (1967), and many cases collected there at n. 16. *See also,* 16 Am. Jur. 2d *Conspiracy,* § 19 at p. 137 (1964). Second, a conspiracy is a partnership or agency for a criminal purpose, so naturally, what one partner or agent says in furtherance of an existing conspiracy is provable against other partners in the enterprise as an exception to the hearsay rule, if there is other adequate evidence that the conspiracy existed and the declarant was part of it. *See* G. Lilly, *An Introduction to the Law of Evidence,* 204, 205, 374-376 (1978). This exception to the hearsay rule is doubtful and confused enough in its own field, hearsay, and the Constitutional limits on its use, without trying to forge its imperfect metal into a weapon to destroy the marital privilege. *See* Davenport, *The Confrontation Clause and the Co-Conspirator Exception In Criminal Prosecutions: A Functional Analysis,* 85 Harv. L. Rev. 1378 (1972). There the author sounds a warning that nearly every writer on conspiracy has echoed:

> "Because of its evidentiary benefits, the co-conspirator exception has long played a major role in criminal trials. Its invocation in practice will often allow evidence otherwise considered unreliable to come before the jury, with the consequent danger that the verdict will be unduly affected not only as to any alleged conspiracy, but also as to any alleged choate crimes. And the threat of its invoca-

tion may operate either as a discouragement to otherwise legitimate activities, especially in the first amendment area, or as a tool of prosecutorial harrassment. The temptation for prosecutors to add a frivolous conspiracy charge to a defendant's indictment (or simply to allege 'a concerted effort') in order to secure these benefits is likely to be considerable." 85 Harv. L. Rev. 1378, 1383, 1384.

4. This Distinction Would Combine Temptation, Opportunity, and Unreviewable Discretion Over Defendant's Evidentiary Rights in the Prosecutor to an Unpermissable Degree.

Though Davenport's remarks are addressed to the dangers of the co-conspirator exception to the hearsay rule, it is clear that the temptations and dangers would be doubled if the government's arguments here were accepted, so that co-conspirator status not only eliminated some hearsay/confrontation protections, but also destroyed the evidentiary privilege of the other defendant. The co-conspirator exception to the hearsay rule is troubling enough in its proper area, without expanding its sway to another unrelated field involving independently important rules and policies. As Davenport observes,

> ". . . It is one thing to say that because we hate all conspirators, we will treat conspirators especially harshly. But it quite another to say that because we hate conspirators, we will treat harshly everyone *accused* of conspiracy." 85 Harv. L. Rev. 1378, 1391.

Yet if conspiracy is the essential key to breaking a privilege that would otherwise obtain, that is exactly what we are doing.

Third, an indictment must be specific enough as to co-conspirators to provide protection under the double jeopardy clause. The specific designation of unindicted co-conspirators in the indictment is so void of real meaning that an indictment may be quite adequate without naming them or all of them. *United States* v. *Gasoline Retailers Association, Inc.*, 285 F. 2d 688, 691, 692 (C. A. 7, 1961); *United States* v. *Williams*, 309 F. Supp. 32, 36 (N. D. Ga. 1969). If they or some of them are needed to

understand the charge or perfect the shield of double jeopardy, a bill of particulars will be granted. *United States* v. *Fine*, 413 F. Supp. 740, 745 (W. D. Wis. 1976); 15A C. J. S. *Conspiracy* § 82 at pp. 847, 848 (1967).

In all of Am. Jur. 2d, there are 65 detailed sections plus 15 pages of pocket part on the law of conspiracy, yet there is not a single mention of this novel doctrine—that co-conspirator status operates to destroy another accused's privileges—in that work. *See* 16 Am. Jur. 2d *Conspiracy* (1964 & Supp. 1978) generally.

In C. J. S. there are 96 sections covering 391 pages, plus 34 pages of detailed index and 42 unnumbered pages of pocket part through 1978, collecting the whole body of American Law on conspiracy. Yet this new doctrine contended for by the government finds no lodgement or suggestion there. *See* 15A C. J. S. *Conspiracy* (1967 & Supp. 1978) generally.

A pedigree so strange and slender should be rightly viewed with grave suspicion.

If naming a witness as a co-conspirator can destroy a defendant's priviege, consider how widely the net this Court is asked to spread stretches. The general conspiracy statute of the United States[3] covers any offense against the government or its agencies or any plan to defraud them. That statute (and there are others, some more severe, omitted for brevity's sake) gives the right to file a conspiracy count for nearly all federal crimes. *See*, to this effect, 15A C. J. S. *Conspiracy* § 48 at pp. 768-775 (1957)

3. § 371. Conspiracy to commit offense or to defraud United States.

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 62 Stat. 701, 18 U. S. C. § 371 (1976).

and the array of cases covering the whole criminal spectrum collected there. Indeed, this one statute now drags in its wake 494 pages of tightly packed specific case annotations (18 U. S. C. A. § 371, pp. 3-498) not counting a further 171 pages (pocket part) added in the last 13 years. 62 Stat. 701, 18 U. S. C. A. § 371 (1966 and Supp. 1978). This is but natural when we consider that few serious crimes beyond simple acts of relatively mindless violence are ever done without planning and cooperation, which are the meat of conspiracy. Nearly every serious crime offers the prosecutor the legitimate option of adding a conspiracy count. It already gives him the tactical advantage of breaking through important parts of the hearsay rule and the bar of *res inter alios acta, alios nec prodest nec nocet (See* 54 C. J. *Res Inter Alios Acta, Alios Nec Prodest Nec Nocet* at p. 719 (1931); 16 C. J. *Criminal Law* § 1113 (1918); 22 C. J. *Evidence* §§ 832, 833 (1920); 32 C. J. S. *Evidence* §§ 576, 577 (1964); and 22A C. J. S. *Criminal Law* § 602 (1961). Should we add to this the temptation that it is also a device to destroy the fundamental evidentiary privileges of the accused? Indeed, if the government's reasoning is sound, there is no valid reason to limit the effect of co-conspirator status to the marital privilege here assailed. Surely any otherwise valid privilege has no higher claim.

In 1925 Judge Learned Hand observed that the then limited temptation of the situation, had made conspiracy ". . . darling of the modern prosecutor's nursery." *Harrison* v. *United States,* 7 F. 2d 259, 263 (C. A. 2, 1925). The powerful further advantages this new rule offers the prosecutor would change conspiracy from the darling of the nursery to the Queen of battles in the courtroom. The Court will recall that in some federal conspiracy prosecutions (as at common law and in several states) there is no need for the government to prove any overt act to accomplish the crime. *See,* for example, *United States* v. *Dreyer,* 533 F. 2d 112, 117 (C. A. 3, 1976).

It is also well to remember that this support or reason for the proposed new dispensation from the rules does not even require the addition of a conspiracy count or charge, easy as that is. It requires even less, just that the defendant's spouse be named as "an unindicted co-conpsirator" in the indictment. The fact and dynamics of the situation are that the prosecuting attorney prepares and draws the indictment for a generally docile and dominated Grand Jury. *See* 2. M. Ploscowe, *Manual for Prosecuting Attorneys,* 350 n.4, 392 (Practising Law Institute 1956). The fact is, in nearly ever case the U. S. Attorney draws up the indictment and the Grand Jury agree—whatever its technical aspects, such as labelling prospective witnesses as "unindicted co-conspirators" or whatever. *See* M. Lightfoot, *Federal Criminal Practice Manual* 30-31 (Calif. Public Defenders Assn. 1974).

Indeed, this could scarcely be otherwise, for the lay members of the Grand Jury need the abilities of a skilled lawyer to enable them to return well drafted indictments adequate to protect the legitimate interests of both the government and the defendant. No criticism or evil imputation is intended against this necessary practice. The point being made is that the decision to label a witness as an "unindicted co-conspirator" is for practical purposes solely that of the prosecutor who must try for conviction. It is in no real sense filtered by the Grand Jury. There is no effective appeal or review. All this is not too grave so long as the designation remains in the piffling sphere it properly occupies. But to make it the excuse for denying the defendant an evidentiary privilege he would otherwise be protected by, as the opinion below would do, is to grant every U. S. Attorney the right to unilaterally, unreviewably repeal the defendant's law of privilege in a case by simply labelling a witness. This is unacceptable to the rule of law in a democracy, however lofty and devoted the corps of prosecutors may be. It is similar in spirit to the "unreasoned distinctions" in increasing re-trial sentences condemned as inadequate to due process in *North*

Carolina v. *Pearce*, 395 U. S. 711, 723-726 (1969), and redolent of the unbridled exercise of arbitrary power by lower government officials struck down in *Yick Wo* v. *Hopkins*, 118 U. S. 356, 370 (1886) as "the essence of slavery itself".

For all these reasons, the label "unindicted co-conspirator" is quicksand upon which to lay all or part of the foundation of a new rule of evidence destroying a vital privilege.

B. The Next Reason Advanced in the Opinion Below for Thrusting Aside Hawkins as Not Controlling Is That the Witness Wife Was "Subject to Prosecution" in This Case. This Distinction Is Insupportable Because:

1. Such a Fact Has Never Been Considered a Reason for Denying a Defendant's Privilege.

The next reason advanced to distinguish *Hawkins* is that the wife in this case was subject to prosecution.

The first response to this is that the distinction raised has no legal significance except to point up the weakness of the evidence. It is nothing more than the "unindicted co-conspirator" argument in a new frock, and that argument has been sufficiently dealt with above. Indeed, the usual response of the law to the testimony of an accomplice (and the wife is nothing different in this case except for the label) has been to view it with great caution, refuse to sustain a conviction upon it without independent corroboration, and warn juries of its weakness. 23 C. J. S. *Criminal Law* § 808 (1961), and numerous cases there collected; H. Underhill, *Criminal Evidence* § 181 (6th ed. 1973). The government's remarkable position here is that because W was in a situation that casts doubt on her testimony (*See Alford* v. *United States*, 282 U. S. 687 (1931), her testimony gains instead of losing strength so that it can override H's privilege, which it apparently could not if the wife were an innocent bystander.

2. The Facts Show the Claimed Difference in Hawkins and This Case Does Not Exist.

In addition, the attempted distinction or factor of distinction (that Mrs. Hawkins was not subject to prosecution) is simply not borne out by a reading of the facts in the *Hawkins* case. There, we know that Hawkins ran a tavern or dancehall in Dogpatch, Oklahoma, where he recruited a 17 year old local girl, Lola, to work as a prostitute with his wife in Tulsa, Oklahoma. The next day Hawkins drove Lola in his car to Mena, Arkansas and then to Tulsa. On the outskirts of Tulsa, very early in the morning,[4] Hawkins stopped at a gas station and made a phone call. In about a half hour, Jane, Hawkins' prostituted wife, drove up with another prostitute "Tommie" in her car. Jane took Lola to Jane's own room in a local hotel where she and Tommie operated. There they redid Lola's make-up and eyebrows while Jane instructed her as to where and how to ply the trade of prostitution and how much to charge.[5] After several days of work, the Tulsa police closed in, and after "Tommie" paid Lola's fine, Jane and her co-workers moved. Jane drove Tommie and Lola to Ft. Smith, Arkansas, where Hawkins met them. Hawkins then took Lola in his car to Hot Springs, Arkansas, where he spent the night with her. Then Lola had a change of heart and caught a bus home to her mom and dad in Dogpatch. Despite all her work at Tulsa, Lola had only one penny left to her name after she bought her bus ticket back to Dogpatch.[6] During the few days Lola had worked in Tulsa, Jane had sent Hawkins a $150.00 money order. Hawkins claimed on re-direct that this was to repay money Jane had taken from his cash register, and had nothing to do with Lola.[7] If the jury believed that, it was the only part

4. ". . . after midnight, along toward daylight." Transcript of Record in *Hawkins* v. *U. S.* in 10th Cir., lodged with this Court at 20.

5. *Ibid.*, 22, 23.

6. *Ibid.*, 33.

7. *Ibid.*, 77, 78, 79.

of Hawkins' testimony they believed, for he spun a tale of innocence, ignorance, and benevolence, yet they convicted him. The point was naturally not pressed by either side, for the government had no interest in discrediting Jane, their own witness, and Hawkins had no interest in providing further evidence of his guilt.

The Court is earnestly urged to read the briefs of both sides in *Hawkins* and the transcript at the court of appeal level, which have been lodged with this Court, with permission, by your *amicus*, as well as the briefs and record at Supreme Court level in the archives of this Court, to verify that the foregoing is an accurate statement of the material facts of *Hawkins* as fully as your *amicus* can discover them.

To say of this case that it is different from *Hawkins* because the wife was subject to prosecution here is to re-shape the facts of *Hawkins* arbitrarily to reach a conclusion those facts will not support. Jane (Mrs. Hawkins) was subject to prosecution in *Hawkins*. She had been jailed by the government as a material witness and put under a $3000 bond to appear as a government witness. *Hawkins* v. *United States*, 358 U. S. 74, 83 (1958). Consider how similar the fact patterns were in *Baker* v. *United States*, 329 F. 2d 786 (C. A. 10), *cert. denied*, 379 U. S. 853 (1964), and *United States* v. *Price*, 577 F. 2d 1356 (C. A. 9, 1978), where the wife was easily charged and convicted. *Brunner* v. *United States*, 168 F. 2d 281 (C. A. 6, 1948), also dealt with a plain case where the wife had taken an active part in the crime, and was thus prosecutable, but could not properly testify against her defendant husband.

This Honorable Court has seen enough Mann Act[8] cases to properly evaluate the claim that Mrs. Hawkins was not subject to prosecution. Indeed, the real concern in *Hawkins* was whether Jane was under such threatening duress that her testimony was not voluntary. *Hawkins* v. *United States*, 358 U. S. 74, 82, 83 (1958). The natural conclusion to draw from the *Hawkins*

8. Stat. 812, as amended 63 Stat. 96, 18 U. S. C. § 2421 (1976).

records is that all that saved Mrs. Hawkins from prosecution was prosecutorial discretion not to prosecute in exchange for her testimony.

C. The Third Reason Advanced in the Opinion Below to Cast Away the Hawkins Rule Was That the New Federal Rules of Evidence Authorize and Permit the Departure. This Reason Is Invalid, Because:

1. The "Light of Reason and Experience" Supports Hawkins.

The third argument advanced by the court below to justify departing from the *Hawkins* rule is that the Federal Rules of Evidence permit and sanction this departure.

This argument ignores the legislative history of the Federal Rules of Evidence. Proposed Rule 505 of the Rules as originally sent to the Congress would have preserved the privilege against spouse pitting central to this case. This Court's Advisory Committee said:

> "About 30 jurisdictions recognize a privilege of an accused in a criminal case to prevent his or her spouse from testifying. It is believed to represent the one aspect of marital privilege the continuation of which is warranted. In Hawkins v. United States (citations omitted) it was sustained." *Advisory Committee Note, Proposed Federal Rule of Evidence 505*, Federal Rules of Evidence for United States Courts and Magistrate's (West, 1975.)

In the first place this is interesting in light of the argument of the Court below that based on the facts of Trammel's case, in the "light of reason and experience" a change in this very marital privilege is dictated. This is not a new argument. It is based on the language of Rule 26 of the Federal Rules of Criminal Procedure, and it was identically argued by the government in *Hawkins, supra*, and there unanimously rejected.

In his thoughtful concurrence in *Hawkins*, Mr. Justice Stewart said that the data necessary to make an intelligent change "in

the light of reason and experience" could never be provided in a single case. He said, back in 1958, that instead, there ought to be a continuing body to study and recommend uniform rules of evidence for the Federal Courts, as prior Circuit Judicial Conferences had recommended. Few would say now this view and advice were not sound. This Court judicially knows its own role in the important events of a decade later.

The suggested body of experts, the Advisory Committee, was formed. Under the aegis and guidance of this Court they probed deeply and labored hard on a new federal code of evidence. And at the end of all their labors and debates, they commended to this Court and this Court approved and forwarded to Congress a re-affirmation of the *Hawkins* rule in the plainest terms. In other words, the re-examination of the rule in the light of reason and experience was made by the means suggested in the *Hawkins* concurrence as best, and the result was unequivocal approval of the *Hawkins* rule. The Rule 26 theorem cannot justly mean that every Federal Court in the land is to re-assess the value of each of the existing rules of privilege in each case and do what seems to each of them best in each case. Yet the court below seems to be saying nearly that. *Trammel* v. *United States,* 583 F. 2d 1166, 1170 (C. A. 10, 1978). The rules of privilege and the values they guard are too precious to be thrown into that sort of a Waring blender.

2. The Legislative History of the Federal Rules of Evidence Show the Clear Intent to Preserve the Hawkins privilege.

At first glance, there might seem to be some comfort for the government in the action of the Congress upon the Rules. After all, all of the proposed rules of privilege foundered there in favor of a return to the reason and experience standard, now embodied in Rule 501 of the Federal Rules of Evidence. The inference or suggestion that this meant that Congress disapproved the *Hawkins* privilege would be quite wrong, as a detailed examination of the legislative history shows. While nearly all

the proposed privilege rules proved very controversial, the only complaint with the husband/wife privilege rule was that it *narrowed* aspects of the privilege other than the *Hawkins* rule, which federal courts had previously adhered to. *See Moore's Federal Practice Rules Pamphlet, Part 2,* at 503 (1975) and Senate Report there quoted at length.

This was part of the several alterations the proposed rules made in the law of privilege, and these alterations were what blocked the passage of the rules through Congress. *See* S. Rep. No. 93-1277, 93rd Cong., 2d Sess. (1974), *reprinted in* [1974] U. S. Code Cong. & Ad. News 7051, 7052-7053.

Congress was so deeply concerned about the proposed alterations that they held firm to what had been so far clearly decided in this Court, that the rules developed under old Criminal Rule 26 should continue to govern, and that this included a continuing prohibition against one spouse testifying against the other. *Supra,* at 7058, 7059. The case of *United States* v. *Redstone,* 488 F. 2d 300 (C. A. 8, 1973), applies the legislative history of proposed Rule 505 and adopted Rule 501 and reaches the reasoned conclusion that *Hawkins* remains the law of the land. See also, *United States* v. *Panetta,* 436 F. Supp. 114 (E. D. Pa. 1977), *aff'd. mem.,* 568 F. 2d 771 (C. A. 3, 1978).

3. An Important Recent Statute of Congress Displays the Intent to Protect Existing Privilege.

So deep was the disquiet raised in Congress by the possible damage to values protected by the existing laws of privilege that they became concerned with the thrust of the proposed privilege rules as effecting the proper spheres of Court and Congress. S. Rep. No. 93-1277, 93rd Cong., 2d Sess. (1974), *reprinted in* [1974] U. S. Code Cong. & Ad. News, 7051, 7055. Out of that deep concern, Congress spoke clearly:

§ 2076. Rules of evidence

> The Supreme Court of the United States shall have the power to prescribe amendments to the Federal Rules of Evidence. Such amendments shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session of Congress but not later than the first day of May, and until the expiration of one hundred and eighty days after they have been so reported; but if either House of Congress within that time shall by resolution disapprove any amendment so reported it shall not take effect. The effective date of any amendment so reported may be deferred by either House of Congress to a later date or until approved by Act of Congress. Any rule whether proposed or in force may be amended by Act of Congress. Any provision of law in force at the expiration of such time and in conflict with any such amendment not disapproved shall be of no further force or effect after such amendment has taken effect. ***Any such amendment creating, abolishing, or modifying a privilege shall have no force or effect unless it shall be approved by act of Congress.***" 88 Stat. 1948, as amended 89 Stat. 806, 28 U. S. C. A. § 2076 (Supp. 1979) (emphasis added).

It is plain that Congress meant to immunize the existing evidentiary privileges against radical judicial changes through rule making without express, specific Congressional approval. Conf. Rep. No. 93-1597, 93rd Cong., 2d Sess. (1974), *reprinted in* [1974] U. S. Code Cong. & Ad. News 7098, 7107. Although the statute technically covers only the rule making power of the Court, the technician's argument that this leaves open the power to the Court to use the alternative route of a specific, single case decision to mutilate the marital privilege more grossly than anything contemplated in the proposed chapter 500 of rejected rules is not satisfactory. This device would be needlessly confrontative of the Legislative branch, who feel deep, legitimate concerns about Federal Law on the privilege issues and have plainly said so. It could be viewed as an unworthy way to evade the careful procedure Congress intended

to be used in reviewing issues of privilege, and cheating them of their undoubted right to have their say. Much good has come of the grant of rule making power to this Court. Would it be wise to embroil this power in a hornet's nest to grant an inherently unworthy advantage to the prosecution in criminal cases?

The mind of Congress in enacting § 2076 is made plain by the remarks of Rep. Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, upon presenting the conference report on H. R. 5463 to the House for final consideration on Dec. 18, 1974. Rule 501 was meant to "leave the Federal law of privilege where we found it." The new rule was not meant, of course, to "freeze" the law of privilege; the power to construe and develop it in light of reason and experience remains. From the context, this meant among other things that the Court was expected to examine the claims to newsmen's privileges, which had been a source of doubt and division in the Congress, and which delicate and important job this Court has since been doing. *See Statement by House Subcommittee Chairman,* 93rd Cong., 2d Sess., 120 Cong. Rec. H 12253 (December 18, 1974), *reprinted in* [1974] U. S. Code Cong. & Ad. News 7108.

But lest this be misunderstood, the Congress adopted together with Rule 501 the statute Pub. L. 93-595, set out above as 28 U. S. C. A. § 2076, and Chairman Hungate stated the reasons for this law:

> "Rules of privilege keep out of litigation relevant and material information. They do so because of a substantive policy judgment that certain values—such as preserving confidential relationships—outweigh the detrimental effect that excluding the information has on the judicial truth-finding process. In short, rules of privilege reflect a substantive policy choice between competing values, and this policy choice is legislative in nature. The legislative character of the policy choice is particularly clear with governmental privileges. Because of the legislative character

of rules of privilege, there is a need for affirmative congressional action in formulating them." *Statement by House Subcommittee Chairman*, 93rd Cong., 2d Sess., 120 Cong. Rec. H 12253 (December 18, 1974), *reprinted in* [1974] U. S. Code Cong. & Ad. News 7108, 7111.

Against the strident cry repeated here as in *Hawkins*, that a single rather tawdry case with an undernourished record represents that "light of reason and experience" which justifies the destruction of the most important part of the marital privilege for all the 220,000,000 people of the United States in all federal cases to come, should be set the sober words of Chairman Hungate in laying down his painfully completed work before his colleagues in the Congress of the United States. His final words were:

> "As I said earlier, this bill is the culmination of over 13 years of work by people in all three branches of Government. The bill is a wholly nonpartisan effort to develop the best possible set of evidence rules to use nationwide in Federal courts. I urge the House to pass this legislation." *Ibid.*, at 7112.

The men who made that massive effort and brought to bear the genuine light of reason and experience on these issues approved of *Hawkins* and meant to keep the *Hawkins* rule. While they did not intend to "freeze" the law of privilege, they enacted at the same stroke as Rule 501, 28 U. S. C. A. § 2076, to show that they did not mean to "melt" it either, or to have the Court melt it without a positive Act of Congress. They meant, as they said, to "leave the Federal law of Privilege where we found it" (*Ibid.*, at 7110) and to stake their claim to the right as elected representatives of the people to participate in changes in that law of the magnitude involved here (*Ibid.*, at 7111). It may be urged that their claim to participate could be expediently evaded in the short run, but this Court has ever shown a proper and decent respect for the functions, spheres, and responsibilities of the coordinate branches. And in the long run, it cannot be

seriously questioned that the Congress have the right and power to legislate independently on the rules of privilege, should they choose.

D. The Opinion Below States That the Defendant Husband Lost His Privilege in This Case Because the Witness Wife Was Given Immunity. This Reason Is Irrelevant, Because:

1. Past Cases Do Not Support This New Theory, But Are Inconsistent With It.

The court below attached great significance to the fact that Mrs. Trammel had been granted immunity from prosecution by the government, in exchange for her testimony. It is clear that this "distinction" from the earlier cases was one of the major underpinnings of the decision:

> "Nothing in *Hawkins* or any other reported decision, to our knowledge, prohibits the voluntary testimony of a spouse who appears as an unindicted co-conspirator under grant of immunity from the government in return for her testimony.
>
> * * * * *
>
> "This case, unlike *Hawkins* and other like cases, involves the wife as a participant in the criminal transaction, subject to prosecution therefor. It matters not, in this context, that the witness granted immunity is the spouse of one of the defendants." 583 F. 2d at 1168.

Even the most cursory reference to *"Hawkins* or any other reported decision," or to *"Hawkins* and other like cases," reveals that the lower court's distinction is illusory, at best.

In *Hawkins*, this court stated that:

> "The government does not here suggest that authority, reason or experience requires us wholly to reject the old rule forbidding one spouse to testify against the other. It does ask that we modify the rule so that while a husband or wife will not be compelled to testify against the other, either will be free to do so voluntarily. Nothing in this Court's

> cases supports such a distinction between compelled and voluntary testimony, and it is emphatically rejected in *Stein* v. *Bowman*, [13 Pet. 209], a leading American statement of the basic principles on which the rule rests. 13 Pet., at 223." 358 U. S. at 77.

Further, as the trial record in *Hawkins* amply demonstrates, the wife was actively engaging in prostitution and in the training of at least one new prostitue who had been transported across state lines by her husband, the defendant on trial for violation of the Mann Act, 62 Stat. 812, as amended 63 Stat. 96, 18 U. S. C. § 2421 (1976).[9]

In *Brunner* v. *United States*, 168 F. 2d 281 (C. A. 6, 1948), a case cited to by this Court in *Hawkins*, 358 U. S. at 75, n. 2, the husband had been convicted of fraudulently obtaining a registered letter addressed to another party. How did he obtain the letter in question? The record is clear:

> "Mrs. Brunner testified that she was the wife of appellant and was willing to testify; that she was at home at 2620 Slevin on December 10, 1946, and remembered the occasion when Nelson [the letter carrier] brought a registered letter to 2622 for Mrs. Pence; . . . that appellant after talking to the carrier came into the house and told her that the mail man was out there and to tell him that she was Mrs. Pence's sister; that she was not Mrs. Pence's sister but she did what appellant told her and brought the letter into the house and put it in her mother's china cabinet . . ." 168 F. 2d at 282.

Mrs. Brunner's culpability in the situation was there, for all to see. Her testimony left no doubt—and its incorrect admission by the trial court left the government with no case, as the Sixth Circuit reversed and remanded the case, with instructions for its dismissal. 168 F. 2d at 284.

Reference to these cases shows that, in the present case, the lower court's "distinction" is, quite simply, insupportable.

9. *See* the earlier discussion of the particular facts in *Hawkins*, *supra* pp. 17-18.

The court below was correct, however, when it observed that:

> "The Congressional intent, then, is that the statutory claim of immunity be as broad as, but no broader than, the privilege against self-incrimination." 583 F. 2d at 1168. (Citations omitted.)

That the purpose of testimonial immunity is to act as a shield for an otherwise criminally liable witness, and not as a sword with which to slay a valid claim of privilege by a defendant, is plain. To state, as the court below did, that "A defendant has no standing to contest the propriety of a grant of immunity to a witness," 583 F. 2d at 1168, is to state a truism which serves to point up the problem, not the answer.

2. Neither Congress or This Court Ever Intended Such a Collateral Effect for the Immunity Statute, Which Is Concerned with the Vth Amendment Rights of the Witness and Not the Rights of Others.

"This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination." H. Rep. No. 91-1549, 91st Cong., 2d Sess. (1970), *reprinted in* [1970] U. S. Code Cong. & Ad. News 4007, 4017. In *Kastigar* v. *United States*, 406 U. S. 441 (1972), this Court stated that,

> "We conclude that the immunity as provided by 18 USC § 6002 leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege. The immunity therefore is coextensive with the privilege and suffices to supplant it." 406 U. S. at 462.

The grant of immunity works as a substitute only for the witness' Fifth Amendment rights against self-incrimination. Further, it "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege." The government is contending, however, that this grant of immunity supplants not only the witness' Fifth Amendment rights, but the marital testimonial

privilege for the witness and defendant spouse, as well. This is nothing more than an attempt to merge the legal identities of both spouses into one indivisible unit for purposes of criminal prosecution—a return to the days of Lord Coke, when he stated that,

> *"Note,* it hath been resolved by the justices that a wife cannot be produced either against or for her husband, *'qua sunt duae animae in carne una'; . . .*" Coke, *Littleton,* 6b. (Emphasis in original.)

3. The Rationale Unwisely Imperils Other Existing Privileges.

Further, the reasoning of the government and of the court below forces the conclusion that any future claim of Fifth Amendment rights against self-incrimination shall work to instantly destroy the claimant's and his or her spouse's entitlement to the husband/wife testimonal privilege!

Your *Amicus* respectfully submits that this Court cannot allow such an assault on this privilege to go unrebuffed. For, if it does, which privilege shall next fall to The Grim Reaper of Immunity —Attorney-Client? Physician-Patient? Priest-Penitent?[10]

10. There is a dearth of decisional authority available on the proposition thus raised by the government. Two decisions located, however, reject the contention, if only implicitly: *Farnsworth* v. *Zerbst,* 98 F. 2d 541 (C. A. 5, 1938) holding that existence of diplomatic immunities of co-conspirators have no effect on the status of a defendant; and *United States* v. *Pappadio,* 346 F. 2d 5 (C. A. 2, 1965), *vacated on expiration of grand jury term sub nom. Shillitani* v. *United States,* 384 U. S. 364 (1966), "Since the policies served by the attorney-client privilege go beyond protection against self-incrimination, the privilege is not destroyed by a grant of immunity from prosecution." 346 F. 2d at 9 (citation omitted).

E. Next, the Opinion Below Finds the Privilege Not Applicable Here Because They Say the Marriage of the Witness and the Defendant Was Worthless. This Reason to Depart from Hawkins Will Not Do, Because:

1. **The Purported Distinctions Are Illusory, Standardless, and Confusing;**
2. **The Past Cases Strongly Reject Such Unwise Judicial Inquiry on Quality of Marriage;**
3. **There Was Not Even a Factual Inquiry on This Point in This Case.**

The court below would have this Court adopt the philosophy of the Clown in Shakespeare's *Twelfth Night,* wherein he said:

> "Many a good hanging prevents a bad marriage . . ."[11]

To properly evaluate the lower courts reliance on its conclusion that the Trammels were party to a "bad marriage", 583 F. 2d at 1170-1171, three questions must be asked:

(1) Is this marriage so qualitatively different from those involved in *Hawkins* and the other cases which the lower court chooses not to follow, as to justify such a departure from the settled law?

(2) Even if this marriage is "bad", is such an inquiry proper within the scope of the federal judiciary?

(3) If such an inquiry is proper, then the final question must be asked: Where is the proof for the ultimate conclusion, i.e., the existence of a "bad marriage" unworthy of protection?

In deciding *Hawkins,* this Court came down solidly in support of the "long-standing rule of evidence which bans a husband or wife from testifying against his or her spouse," 358 U. S. at 74, as interpreted and applied by the lower courts in *Paul* v. *United States,* 79 F. 2d 561 (C. A. 3, 1935), *Brunner* v. *United States,*

11. William Shakespeare, *Twelfth Night; or, What You Will,* Act I, Scene V, line 20.

168 F. 2d 281 (C. A. 6, 1948), and *United States* v. *Walker*, 176 F. 2d 564 (C. A. 10), *cert. denied*, 338 U. S. 891 (1949). 358 U. S. at 75, n. 2. Were the marriages in those cases so far superior to the Trammel marriage, as to warrant distinction?

In *Paul*, the husband and wife had lived separate and apart for nearly five years; the husband had alleged that his wife had forged his endorsement to a check, so testifying at trial over his wife's objection. Held by the Third Circuit: "The learned court . . . [below] fell into errror in permitting Norman Castle Reid to testify against his wife . . ." 79 F. 2d at 563.

In *Brunner*, the husband and wife committed "fraud and deception" in obtaining a registered letter addressed to a third party; the wife, after a hearing in chambers, testified over her husband's objection to the full extent and nature of their joint criminal acts. She further testified that her husband had threatened to kill her if she revealed their actions. The Sixth Circuit held *Graves* v. *United States*, 150 U. S. 118 (1893), to be unaffected by the later decision in *Funk* v. *United States*, 290 U. S. 371 (1933), and controlling in the case before them: "[T]he wife was not a competent witness against her husband." 168 F. 2d at 283.

In *Walker*, the husband had been convicted of "transporting from Houston, Texas, to New York City sums of money, 'taken feloniously by fraud and with intent to steal and purloin.' " 176 F. 2d at 565 (footnote omitted). The court described the marriage thusly: after inducing his wife to sell some real estate in order to turn the proceeds over to him, the husband "dispatched her, first to Canada, and later to Alaska, were she lived in destitution until her eyes were at length opened, and at the time of trial she had brought a suit against him for divorce." 176 F. 2d at 565-566. The wife was permitted to testify at trial, over the husband's objection. The Second Circuit reversed and remanded the conviction "because we hold that no part of the testimony of the witness [the wife] was admissible

anyway; and for that reason the judgment cannot stand." 176 F. 2d at 567-568.

In *Hawkins* the government described the marital relationship in the following manner:

> "[I]n the instant case the parties were living apart, further attenuating a conjugal relationship that seems never to have been too substantial.[17]

17. Petitioner inadvertently referred to the witness whose testimony is in question as his 'ex-wife' and stated, in excuse for his lapse, that they had never lived together very much (R. 46). At the time of the acts complained of, she was living apart from him under an assumed name." Government's Brief, *Hawkins* v. *United States*, 358 U. S. 74 (1958) at 28.

Nevertheless, in rejecting the government's contentions this Court stated that,

> ". . . there is still a widespread belief . . . that the law should not force or encourage testimony which might alienate husband and wife, or further inflame existing domestic differences. Under these circumstances we are unable to subscribe to the idea that an exclusionary rule based on the persistent instincts of several centuries should now be abandoned." 358 U. S. at 79.

Which marriage was a "better" marriage, more worthy of protection? Which was least deserving of recognition? Which fell in between? It is obvious that no rational distinction can be drawn between the subject husband/wife relationships, sufficient to warrant the abandonment of the "persistent instincts of several centuries . . ."

Even if such a distinction could be reasonably established, however, the question still remains: Should the federal judiciary engage in such inquiries, analyses, and judgments?

In *United States* v. *Walker*, 176 F. 2d 564 (C.A. 10), *cert. denied*, 338 U. S. 891 (1949), Chief Judge Learned Hand in speaking for the court, rejected any suggestion of such activities on the part of this nation's judiciary:

> "Nor is it either practicable or desirable to make the decision [of whether or not the subject marriage is deserving of the protection afforded by the privilege] dependent upon the judge's conclusions that in the instance before him the marriage has already been so far wrecked that there is nothing to save. That was true, no doubt, here; but we must look beyond the case before us. The questions will always arise in the progress of the trial; it must be decided at once; and its answer introduce a collateral inquiry likely to complicate the trial seriously. The common-law avoided such an inquiry by taking divorce as the only test; and while the privilege persists at all, there is every reason so to limit the exception." 176 F. 2d at 568.

Twenty years ago, in its Brief to this Court in *Hawkins*, the government was emphatic in its position:

> ". . . reason and experience justify the view that one spouse should not be compelled to testify against the other . . ." Government's Brief, *Hawkins* v. *United States*, 358 U. S. 74 (1958), at p. 7.
>
> "It is the government's position that there is a vast difference between compelling a wife to testify against her husband and permitting her to testify if, of her own volition, she chooses to do so. The valid arguments in favor of the marital privilege against permitting unfavorable testimony are arguments only against *compelling* such testimony." *Ibid.*, p. 13 (emphasis in original).
>
> "[W]e suggest that there is a general reluctance and aversion to *compelling* a man or a woman to testify against his or her life-partner." *Ibid.*, p. 24 (emphasis in original).
>
> "[W]e think that reason and experience support the view that a spouse should not be compelled to testify against her will . . ." *Ibid.*, p. 42.

Now, the government is contending that its prosecutors have the right to adjudge a marriage worthless and force one spouse to testify against another; and that our courts have the prerogative to concur in that judgment of unworthiness and to ignore the existence of a valid, legal marriage. To what limits

will this discretion extent?[12] It is patently clear that our courts should not indulge in a "Who's Got The Best Quality Marriage" judging competition.

But assuming *arguendo* that the court below was faced with a unique situation, one which required it to pass judgment not only on the merits of the case but on the Trammel's married life, as well, the opinion is devoid of any indication that the court seriously considered and weighed the variables which of necessity would form part of any such calculations. The opinion tells us that the lower court determined that,

> "It is inconceivable that the Trammels established a 'home' with any of the usual, ordinary attributes of 'family life.' There was no domestic harmony in the commonly accepted nature of a marital relationship to be preserved following commencement of the criminal activities in August of 1975." 583 F. 2d at 1170.

The court had noted earlier that it was a matter of "rank conjecture" as to the extent of Mrs. Trammel's free consent to participate in the activities which led to her husband's arrest and conviction. *Ibid.* And see Judge McKay's analysis of the non-record on this point in 583 F. 2d at 1173.

Has this Nation's judiciary arrived at the point where it will break ancient principles and rules of law, in order to convict, on the bais of "rank conjecture"?

---

12. "Writers who say that it is difficult to distinguish devil's marks from natural blemishes, from a carbuncle, or from impetigo clearly show that they are not good doctors." Statement of a physician to Henry IV of France, quoted in R. Robbins, *The Encyclopedia of Witchcraft and Demonology* 136 (Crown Publications 1959).

F. The Final Reason the Opinion Below Gives for Breaking Through the Hawkins Privilege Is That the End Justifies the Means, That Is, the Defendant Is Bad and Thus Is Entitled to Fewer Rights Than Good Persons. This Is Not Sound Law, But a Dangerous Breach of Uniform Standards of Justice.

The final basis asserted by the lower court for affirming petitioner's conviction is short, but hardly sweet:

> "The overriding benefit to be served in this case has been properly served by the action of the trial court: that of bringing to the bar of justice those who have committed grievous criminal acts which most assuredly have led to the breakdown and destruction of many family units and marital relations involving illicit trafficking and use of dangerous drugs and narcotics." 583 F. 2d at 1171.

In other words, petitioner had engaged in criminal activities which were so "despicable," 583 F. 2d at 1170, that the court below felt it proper to justify the affirmation of his conviction based upon its subjective reaction to the prosecution's allegations, ignoring petitioner's entitlement to the husband-wife testimonial privilege.

Such a jurisprudential attitude is by no means new; nor is it acceptable to a system based on justice:

> "Our government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example . . . To declare that in the administration of justice the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." Brandeis, J., dissenting, *Olmstead* v. *United States*, 277 U. S. 438, 485 (1928).

II.

THE CONSTITUTIONAL IMPLICATIONS OF UPHOLDING THE REASONING OF THE OPINION BELOW WOULD BE PERVASIVE AND SEVERE. WHILE THESE IMPLICATIONS ARE NOT CONSIDERED, EXPLORED OR DEVELOPED IN THE OPINION BELOW, THEY ARE REAL AND IMPORTANT. THE OPINION BELOW IMPAIRS A DEEP NATURAL RIGHT OF PRIVACY ROOTED IN THE Ist, IVth, Vth, AND IXth AMENDMENTS. THOUGH THESE RIGHTS WERE OVERLOOKED IN THIS CASE, THEY WILL RISE TO BE LITIGATED IN MANY CASES AND ASPECTS IF THE REASONING OF THE OPINION BELOW BECOMES THE LAW OF THE LAND.

A discussion of the proposed major alteration in the law of marital privilege would be lacking if it did not suggest to this Court the larger Constitutional implications. The rules of evidence are not, of course, for the most part, constitutional rules, but in specific areas they may involve or even collide with constitutional rights. In addition, privileges are not just exclusionary rules of evidence, they are also rules of substantive law created for the purpose of encouraging and protecting certain relationships society deems valuable. Reutlinger, *Policy, Privacy and Prerogatives: A Critical Examination of the Proposed Federal Rules of Evidence as They Affect Marital Privilege*, 61 Calif. L. Rev. 1353, 1358 (1973). *See also*, an even more forceful argument on the same tack, Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 Tul. L. Rev. 101, 111 (1956).

The validity of the marital privilege rests on two grounds. The first is the furtherance of a socially valuable institution. The second is the protection of the constitutional right to privacy. "What is at stake is no less than a right to privacy in that area of life in which privacy is perhaps most important." Reutlinger, *supra*, at 1370. This Court, in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), articulated the right to privacy

as constitutionally protected in the marital relationship. The Court recognized, as others have agreed, that privacy is central to a harmonious marriage. "A marriage without the right of complete privacy of communication would necessarily be an imperfect union." Louisell, *supra,* at 113.

The Constitutional protection of the right of privacy and the common law policy of promoting marriages necessitate that the privilege be recognized and honored. Regardless of the probative value, testimony concerning communications or conduct performed within the marital context must not be compelled or elicited without a waiver of the privilege. The search for truth in an adversary setting must not work a denial of basic constitutional rights, nor should it take automatic precedence over institutions critically important to human liberty. Those institutions have been protected at law by the operation of a system of privileges: husband-wife, attorney-client and priest-penitent most notably. The application of the Tenth Circuit's reasoning in this case would work to erode the stability of these institutions and the public faith in judicial system. A public "repelled by the visage of a judicial proceeding seemingly directed against marital harmony and unity might well turn from any cooperation with the courts." Note, *The Husband-Wife Privileges of Testimonal Non-Disclosure,* 56 Nw. U. L. Rev. 208, 231 (1961).

The marital privilege is protected in part because it is an essential shield of privacy. While some of the law of privacy is not constitutional, the rights of privacy do have their roots deep in constitutional soil, as *Griswold, supra,* illustrates. A full development of these themes is beyond the scope permitted to this brief, but these roots are set in the Ist, IVth, Vth, and perhaps IXth Amendments. *See* M. Slough, *Privacy, Freedom and Responsibility* 18 (1969). As to the constitutional complications and undesireability of laws and devices pressing privacy too closely, or invading it, see the same work at pages 14 and 15, and preface ix. The whole work is a balanced review

of the problems and authorities which space will not permit to be developed here. It only remains to be said that if the Court adopts the rule the government contends for here this area will have to be litigated in detail. The problems will not go away; they will multiply and grow.

III.

CONCLUSION. FOR ALL THE ABOVE REASONS THE HAWKINS ANTI-SPOUSE PITTING PRIVILEGE SHOULD BE RE-AFFIRMED AND HELD FULLY APPLICABLE TO THE FACTS HERE.

The six claimed reasons or distinctions advanced in the opinion below for departing from the settled rule of this Court in *Hawkins* v. *United States,* 358 U. S. 74 (1958), are severally erroneous. In addition, there are powerful reasons of policy against the radical departure from the settled law made in the opinion below, and substantial, basically unexplored Constitutional dangers in so doing. For these reasons, as detailed in this brief, your *Amicus* urges that the privilege of each spouse against the testimony of their marital partner, as unanimously upheld by this Court in *Hawkins* v. *United States, supra,* should be preserved.

Respectfully submitted,

FRANK E. BOOKER,
Attorney for Amicus Curiae Michigan Bar Association Standing Committee on Civil Procedure.

FOR ARGUMENT

Supreme Court, U.S.
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SEP 18 1979
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-5705

OTIS TRAMMEL, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF FOR THE AMICUS CURIAE THE MISSOURI BAR

OPINION BELOW

The opinion of the Court of Appeals is reported at 583 F.2d 1166. There was no reported opinion at the District Court level.

JURISDICTION

Jurisdiction of this Court was invoked by Petitioner under 28 U.S.C. § 1254(1) and Rule 19 of Rules of the Supreme Court of the United States and on February 26, 1979, this Court granted certiorari.

QUESTION PRESENTED

The Petition for Writ of Certiorari presented the question:

> "Is it reversible error to permit a wife to testify against her husband over his objection and without his consent?"

STATEMENT

The Petitioner was convicted of unlawfully importing heroin and conspiracy to unlawfully import heroin. The government's case against Petitioner was based on the testimony of his wife. The government granted use immunity to the wife in the usual manner. The Petitioner made timely, repeated, adequate objection to the use of his wife as a witness against him, and her testimony, as a violation of marital privilege. On appeal, the 10th Circuit held in the opinion below that *Hawkins v. United States*, 358 U.S. 74 (1958) was not controlling and that the Petitioner was not entitled to the marital testimonial privilege. Petitioner sought certiorari in this Court, which was granted.

SUMMARY OF ARGUMENT

The Missouri Bar joins and concurs fully in the brief *Amicus Curiae* of the Michigan Bar Standing Committee.

ARGUMENT

The Consent of All Parties to the Filing of This Brief Has Been Obtained. The Missouri Bar Joins and Concurs Fully in the Brief *Amicus Curiae* of the Michigan Bar Standing Committee.

The Missouri Bar, with the consent of all parties, joins their brothers of the Michigan Bar to resist the threat to evidentiary privileges and privacy posed by the practices seen in this case and the theories advanced to support them by the Court of Appeals below. The destruction of the anti-spouse pitting privilege would damage the family and society beyond any possible need or benefit of government. Beyond that, if the justifications and reasons advanced to thus shatter the seal of silence upon the relationship of husband and wife are upheld, how can the newer and less basic relationships of lawyer and client or clergyman and parishioner withstand them?

For these reasons, The Missouri Bar joins the Amicus Michigan Bar Committee in urging the re-affirmation of the settled rule of *Hawkins v. United States*, 358 U.S. 74 (1958).

Respectfully submitted,

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The Missouri Bar